

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . August 21, 2013
Debtor. . 10:02 a.m.

HEARING RE. EMERGENCY MOTION FOR
CLARIFICATION OF THE JULY 25, 2013, STAY ORDER

EXPEDITED HEARING RE. NOTICE OF PENDENCY OF DEFENDANT
SYNCORA GUARANTEE, INC.'S, EMERGENCY MOTION TO DISSOLVE
THE TEMPORARY RESTRAINING ORDER AND CONDUCT
EXPEDITED DISCOVERY

STATUS HEARING RE. CORRECTED MOTION TO ASSUME LEASE OR
EXECUTORY CONTRACT

ADVERSARY PROCEEDING 13-04942 - STATUS CONFERENCE RE.
ORDER GRANTING IN PART AND DENYING IN PART DEBTOR'S
EX PARTE MOTION FOR AN ORDER SHORTENING NOTICE, STAYING
FURTHER BRIEFING AND SCHEDULING AN EXPEDITED HEARING WITH
RESPECT TO MOTION OF DEBTOR CITY OF DETROIT TO SCHEDULE
STATUS CONFERENCE, SET BRIEFING SCHEDULES AND
MAINTAIN STATUS QUO

BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE CLERK: All rise. Court is in session. Please
2 be seated. Case Number 13-53846, City of Detroit, Michigan,
3 and Case Number 13-04942, City of Detroit versus Syncora
4 Guarantee, et al.

5 THE COURT: One second, please. Chris. All right.
6 Did someone want to be sworn in?

7 ATTORNEY: Yes.

8 THE COURT: Someone would like to be admitted to the
9 bar of the Court. Step forward, please.

10 MR. COCO: Good morning, your Honor.

11 THE COURT: Good morning. What are your names,
12 please?

13 MR. COCO: Nathan Coco from McDermott, Will & Emery.

14 THE COURT: Mr. Coco.

15 MR. PRICE: Good morning, your Honor. William Price
16 from Clark Hill.

17 THE COURT: Mr. Price.

18 MR. GUADAGNINO: Frank Guadagnino, Clark Hill.

19 THE COURT: What's your last name, sir?

20 MR. GUADAGNINO: Guadagnino.

21 THE COURT: Welcome. Okay. Are the three of you
22 prepared to take the oath of admission to the Bar of the
23 Court? Please raise your right hands. Do you affirm that
24 you will conduct yourself as an attorney and counselor of
25 this Court with integrity and respect for the law, that you

1 have read and will abide by the civility principles approved
2 by the Court, and that you will support and defend the
3 Constitution and laws of the United States?

4 ATTORNEYS: I will (collectively).

5 THE COURT: All right. Welcome. We'll take care of
6 your paperwork for you. You are all set.

7 ATTORNEY: Thank you, your Honor.

8 THE COURT: You're welcome. One second, please. My
9 password is not working here, Chris. All right. Well, let's
10 start. I want to start with the Davis matter, please.

11 MR. PATERSON: Thank you, your Honor. Andrew
12 Paterson on behalf of Robert Davis.

13 THE COURT: And you may proceed, sir.

14 MR. PATERSON: Sir, this is our motion for
15 clarification of your stay order that was entered in July and
16 addressed, as we saw it, three state lawsuits that were
17 included in the stay, although the debtor was not a party to
18 those suits, but they did involve the first or second biggest
19 liability of the debtor, the pension plans. And the
20 definition or the identification of those cases was set forth
21 in the motion, and your order did adopt that.

22 THE COURT: Excuse me one second, sir. Chris, it's
23 working. Go ahead, sir.

24 MR. PATERSON: Since that time, your order has been
25 interposed in our state case up in Ingham County on an open

1 meetings case. It's also been interposed in other matters
2 that I've been involved in, and I'd like to have some
3 clarification as to the extent of that order. I feel that
4 the state proceeding in Ingham County is an open meetings
5 case that has no impact whatsoever directly or practically on
6 the debtor's Chapter 9 protections.

7 THE COURT: Well, let's talk about that. What does
8 your client seek to accomplish by that lawsuit?

9 MR. PATERSON: A declaration from the Court that the
10 Loan Board violated the Open Meetings Act in connection with
11 the appointment of Mr. Orr under Public Act 72 as the
12 emergency financial manager for the City of Detroit.

13 THE COURT: And what does he intend to do with that
14 declaration if he obtains it?

15 MR. PATERSON: The declaration is used in the state
16 court to guide conduct of public bodies, and I will also seek
17 an injunction that they not violate the OMA again, although
18 it's somewhat moot at this point since Public Act 72 has now
19 been repealed by the enactment of Public Act 436 of 2012
20 under which Mr. Orr currently serves and is appointed.

21 THE COURT: Is it your representation to the Court
22 that it is not the intent of your client to use such a
23 declaration to remove Mr. Orr from office?

24 MR. PATERSON: It is, and he did in our reply brief
25 so stipulate that we would not be appealing any such

1 decision. I also indicated to the Court and have brought
2 with me a copy of the transcript from our July 24 hearing
3 before Judge Collette wherein he indicated that he was not
4 going to invalidate any actions taken by the Loan Board in
5 connection with the appointment.

6 THE COURT: Well, I appreciate that, but I want to
7 be sure you understand the very specific question I'm asking
8 you. I get that it is not the intent of your client or of
9 the state court to invalidate any of the actions of the Loan
10 Board or any of the actions that Mr. Orr has taken from the
11 time of his appointment until whenever that judgment might be
12 entered. I've got that.

13 MR. PATERSON: Nor could I seek that relief, nor
14 could the Court grant that under Michigan law.

15 THE COURT: But that's not the question I'm asking.
16 I'm asking is -- the question I'm asking is is it your
17 representation to the Court that your client will not seek to
18 use that judgment to remove Mr. Orr from office in the
19 future?

20 MR. PATERSON: That is, in fact, our stipulation.

21 THE COURT: So if I heard you correctly, what you
22 plan to do with this judgment is to use it to enjoin the Loan
23 Board or others from violating the Open Meetings Act in the
24 future?

25 MR. PATERSON: That is correct.

1 THE COURT: And anything else?

2 MR. PATERSON: No. I mean the relief that I seek is
3 the declaration. I am compelled to ask for an injunction
4 against further violations. It's within the discretion of
5 the state court to issue or not issue that, and then I will,
6 of course, be seeking reimbursement of the attorneys' fees
7 and costs.

8 THE COURT: All right. So the question remaining to
9 be addressed is why shouldn't the order that the Court
10 previously entered be read to stay your suit or the suit
11 where you represent Mr. Davis?

12 MR. PATERSON: Because none of the debtor's assets
13 or property is affected whatsoever by my suit. My suit is
14 against state actors, not against the city. The city is not
15 a party. None of its departments are parties. None of its
16 assets or property is subject to any action by the Circuit
17 Court in my OMA suit. My OMA suit is exclusively against the
18 governor, the state treasurer, and the state Emergency
19 Financial Loan Board.

20 THE COURT: All right. Anything further, sir?

21 MR. PATERSON: No. I would just emphasize that the
22 de facto doctrine does validate all of the acts that have
23 occurred to date, in any event, and there's been no response
24 to that. I mean that is clearly the state law.

25 THE COURT: Thank you, sir.

1 MR. PATERSON: Thank you.

2 THE COURT: Who will be addressing this? Oh, I'm
3 sorry.

4 MS. BRYA: Good morning, your Honor. Michelle Brya
5 and Joshua Booth. We represent the governor, the state
6 treasurer, and the Local Emergency Financial Assistance Loan
7 Board in the state case.

8 It is our position that the scope of your order
9 extending the bankruptcy stay should include the Davis case.
10 In the debtor's motion they specifically requested that it
11 apply to actions against the governor, the treasurer, and the
12 Loan Board that directly or indirectly seek to enforce claims
13 against the city or interfere with the city's actions or
14 activities in the Chapter 9 case. Although the order that
15 was signed by this Court specifically acknowledged the three
16 pre-petition cases, we believe that by the language of that
17 order it said that that language was included for the
18 avoidance of doubt, and it didn't in any way limit the scope
19 of your order to those three cases.

20 The defendants in the state case, the Davis versus
21 Loan Board case, are the exact same defendants that this
22 Court acknowledged in its order, the state treasurer, the
23 governor, and the Local Financial Emergency Loan Board, and
24 Davis seeks to invalidate the emergency manager, and that
25 would clearly interfere with the state's activities in the

1 Chapter 9 bankruptcy case. Until Mr. Paterson filed his
2 reply brief, we weren't aware of his position with respect to
3 the invalidation, but clearly in his prayer for relief in the
4 state case in his second amended complaint he requests a
5 declaration that all decisions of the defendants, including
6 its votes taken at the March 14th Loan Board meeting, are
7 invalidated, and one of the decisions that they made that day
8 was the appointment of Mr. Orr, so we believe that by seeking
9 such relief, Mr. Paterson and Mr. Davis have not withdrawn
10 those claims for the invalidation of the emergency manager,
11 and, therefore, Judge Collette in the state case could still
12 order that invalidation occur and that Mr. Orr's appointment
13 be invalidated. And we believe that that could have a
14 significant impact on the Chapter 9 proceedings, and we're
15 asking that you extend the scope of stay.

16 THE COURT: Suppose the motion were granted with the
17 condition that prohibited that?

18 MS. BRYA: That prohibited the ability for the state
19 court to invalidate the emergency manager?

20 THE COURT: Precisely.

21 MS. BRYA: That would be something that we would be
22 probably comfortable with, your Honor. I mean certainly
23 that's the concern that we have is that if his position is
24 invalidated, then it could significantly impact the City of
25 Detroit and the state in general.

1 THE COURT: It sounds like all Mr. Davis and his
2 counsel want here is a declaration that the Open Meetings Act
3 was violated and attorney fees.

4 MS. BRYA: To some extent I think that that's
5 correct, your Honor, although they still have those claims in
6 their complaint, and so that relief, again, can still be
7 granted.

8 THE COURT: But if my order of clarification limited
9 Mr. Davis to those two forms of relief, you would be
10 comfortable with that?

11 MS. BRYA: Yes, your Honor, I believe we would.

12 THE COURT: All right. Thank you.

13 MS. BRYA: Thank you, your Honor.

14 MR. HEIMAN: Good morning, your Honor. David
15 Heiman, Jones Day, on behalf of the city. As a technical
16 matter, this seems more like a request for relief from stay
17 than clarification, but I'll leave that to your Honor, and I
18 don't -- it matters not to me whether we try to go through a
19 proper process or not in that respect, but I would like to
20 say that we're obviously very concerned about anything that
21 would in any way question the role or authority of the
22 executive decision-maker of the city, and I cannot imagine
23 anything that would be more disruptive to a Chapter 9 case
24 than that. So to just respond to your proposal, if I can
25 call it that, I also have no problem with the suggestion as

1 it relates to Mr. Davis and his counsel, Mr. Paterson. I am
2 concerned, however, about the impact of a ruling that
3 potentially invalidates the -- for the record, invalidates
4 the appointment of Mr. Orr not so much for the party that is
5 making the commitment to your Honor but for the rest of the
6 world and what they do with that, so I think we have to
7 address that. I have no problem with your Honor getting
8 comfortable with whatever works here, but I just want to make
9 sure that we have covered the waterfront in terms of not
10 being exposed to some third party coming in and saying, "Look
11 at that order," so with that --

12 THE COURT: Is it possible -- one second, sir. Is
13 it legally possible to give Mr. Orr and the city that kind of
14 protection?

15 MR. HEIMAN: I would assume -- I'm not a
16 constitutional scholar, your Honor, but I would assume if
17 your Honor issues an order that makes it clear -- and what I
18 think I heard you say is your order would say that, without,
19 again, being technical, the stay will not apply to the Davis
20 lawsuit -- the pending Davis lawsuit so long as the
21 Bankruptcy Court does not move to invalidate the appointment
22 of Mr. Orr.

23 THE COURT: Well, you said "Bankruptcy Court," but,
24 of course, you mean the Circuit Court.

25 MR. HEIMAN: Yes. I'm sorry. Excuse me. I'm

1 sorry. And so --

2 THE COURT: Well, actually my question was a little
3 more specific than that. It was the stay would be clarified
4 to permit Mr. Davis to seek a judgment -- a declaratory
5 judgment under the Open -- that the Open Meetings Act was
6 violated, obviously not finding that. That's not our role
7 here, but a declaratory judgment that the -- seeking a
8 declaratory judgment that the Open Meetings Act was violated
9 and attorney fees, period.

10 MR. HEIMAN: Okay. And if I may suggest that we add
11 to that and that no other party may use any such ruling
12 should it come to pass in any way regarding -- with respect
13 to Mr. Orr's appointment without coming back to the
14 Bankruptcy Court, I think we would be satisfied, so it's --
15 it would, in fact, be a clarification of the stay as relates
16 to Mr. Davis' lawsuit, so I would think we could do that,
17 your Honor.

18 THE COURT: Sir.

19 MR. PATERSON: Yes. I think the Court should be
20 aware that the Open Meetings Act itself I think addresses Mr.
21 Heiman's concern. Section MCL 15.273 reads, "The circuit
22 court shall not have jurisdiction to invalidate a decision of
23 a public body for a violation of this act unless an action is
24 commenced pursuant to this section within the following
25 specified period of time," and then "(a) Within 60 days after

1 the approved minutes are made available to the public by the
2 public body." His appointment was on March 14th. Sixty days
3 have come and gone. No one else can seek to invalidate the
4 appointment of Mr. Orr under Public Act 72 because the
5 Circuit Court would not have jurisdiction.

6 THE COURT: So I take it by that that you wouldn't
7 object to the additional suggestion that Mr. Heiman made
8 here.

9 MR. PATERSON: I would not. It simply restates the
10 law, I think, of the state.

11 THE COURT: Sir.

12 MR. HEIMAN: No. I was good.

13 THE COURT: Okay.

14 MR. HEIMAN: Thank you.

15 THE COURT: Well, in the circumstances, it appears
16 to the Court that we have an agreement as to how this motion
17 should be resolved, so, Mr. Peterson, I'm going to ask you to
18 prepare an order with the three agreed upon conditions here
19 and have it approved as to form by the Attorney General's
20 Office and counsel for the city and then submit it to the
21 Court.

22 MR. PATERSON: Will do. Thank you, your Honor.

23 THE COURT: You're all set, sir. All right. Let's
24 turn our attention to the Syncora matters. I'd like actually
25 first to address the adversary proceeding if that's okay with

1 everyone. Who will be addressing the adversary proceeding
2 for the city?

3 MR. SHUMAKER: I will, your Honor. Gregory Shumaker
4 of Jones Day.

5 THE COURT: Mr. Shumaker.

6 MR. SHUMAKER: Yes.

7 THE COURT: All right. So let's review where we are
8 in the adversary proceeding and where we think we might be
9 going. Okay?

10 MR. SHUMAKER: Certainly.

11 THE COURT: As best I can figure it, Syncora has a
12 motion to dismiss that's pending and fully briefed and needs
13 a hearing date. Yes?

14 MR. SHUMAKER: It's almost fully briefed, your
15 Honor. There's a reply brief from --

16 THE COURT: Reply brief, yes.

17 MR. SHUMAKER: -- the city due I think on the 26th.

18 THE COURT: Okay. There is the city's motion for a
19 protective order. What's the briefing status on that?

20 MR. SHUMAKER: The reply brief was filed by the city
21 recently, and that was in response, if you recall, your
22 Honor, to their emergency motion to dissolve the TRO and for
23 discovery, so we responded by responding to the motion to
24 dissolve and then with a motion for protective order with
25 respect to the discovery they sought.

1 THE COURT: Right. And so then the other motion is
2 the motion to dissolve the TRO.

3 MR. SHUMAKER: That's right, your Honor.

4 THE COURT: All right. Well, my questions for you
5 are what is the city's position on dissolving the TRO, and I
6 ask that with the vague notion that perhaps the TRO has
7 already expired by its own terms, if not by operation of law
8 or rule, and what further relief does the city seek in this
9 adversary proceeding, in any event?

10 MR. SHUMAKER: Well, your Honor, excellent
11 questions. The TRO, of course, by Michigan law typically
12 expires as of 14 days. Judge Berry indicated that the TRO
13 should remain in full force and effect until the Court
14 specifies otherwise. After that happened, the case then got
15 removed, and then it got transferred to your Honor, referred
16 to your Honor, so the TRO has been out there. If you will,
17 we believe that one option for the Court would be under
18 Section 108(b) of the Bankruptcy Code, which allows -- when
19 an order is enforced in a nonbankruptcy proceeding and fixes
20 a period which is -- say it's 14 days -- the city filed on
21 the 13th day. The TRO was entered on July 5th, and the city
22 filed on July 18th. Section 108(b) provides a 60-day, if you
23 will, extension, but I can't tell you, your Honor, that I've
24 got a case on that one, but it is something. But in the end,
25 the TRO has been out there. We know that it is still needed,

1 which has kind of hung up the communications between the
2 parties because we know that Syncora is going to try to
3 capture or try to trap the \$15 million that goes into the
4 lockbox arrangement every month, and so we have been
5 unwilling, without them agreeing to not go after the cash, to
6 agree to a dissolution.

7 THE COURT: But it's your position that the
8 automatic stay --

9 MR. SHUMAKER: Correct, your Honor.

10 THE COURT: -- would prohibit that regardless.

11 MR. SHUMAKER: I don't mean to say what I just said
12 was not relevant because I think it is, but in the end we
13 think since the city has filed that the casino revenues, if
14 you will, your Honor, the tax -- the wagering taxes, are
15 subject to the automatic stay, so the TRO may have run its
16 useful life, but we do believe that the automatic stay would
17 prohibit Syncora from taking the actions that it intends to
18 take.

19 THE COURT: Well, is it -- just procedurally is it
20 your and your client's intent to try to keep this temporary
21 restraining order in effect, if it is in effect, pending this
22 Court's ruling on whether the stay is in effect as to this
23 property?

24 MR. SHUMAKER: Well, your Honor, what we have asked
25 for is that the Court maintain the status quo through the

1 hearing on the assumption motion because the purported
2 consent rights that Syncora is asserting are also -- are
3 going to be ruled upon, if you will, in that proceeding, and,
4 therefore, we see them as very closely connected. And what
5 we would prefer, your Honor, is either an extension of the
6 TRO or -- you know, that's why I raised the 108(b) vehicle --
7 or simply -- I don't think we're asking for the stay. We
8 just noted the stay applies to this property or we believe
9 the stay applies to this property, and Syncora has not moved
10 to -- moved for relief from the stay. And as a result, we
11 would --

12 THE COURT: It contends the stay doesn't apply.

13 MR. SHUMAKER: I'm sorry.

14 THE COURT: It contends the stay does not apply.

15 MR. SHUMAKER: That's correct, your Honor. That's
16 correct, which we disagree with, and I'm more than happy to
17 address those points, your Honor, if you'd like me to, but
18 we -- and they filed a statement yesterday that went into the
19 different reasons why they believe the automatic stay does
20 not apply.

21 THE COURT: Right. I saw that.

22 MR. SHUMAKER: Yeah. Oh, your Honor, one other
23 thing I should raise is not only is the 362 stay out there,
24 but we also believe that there's a stay under Chapter 9 that
25 applies which is 922(a)(2), which would also prevent Syncora

1 from taking post-petition action against the casino revenues
2 which are taxes, and so that would be another vehicle for
3 maintaining the status quo as we believe is necessary.

4 THE COURT: Well, if you got a court order
5 clarifying that the stay does prohibit Syncora notifying U.S.
6 Bank to trap these funds, would that obviate the need for
7 this adversary proceeding altogether?

8 MR. SHUMAKER: I don't -- the remaining aspects of
9 the adversary proceeding would be the tort claims that the
10 city advanced in that initial complaint on July 5th, which
11 were the intentional interference with a contract,
12 intentional interference with an advantageous relationship,
13 so those torts presumably would move forward, but in terms
14 of, you know, the declaration that we sought, at least --

15 THE COURT: Well, but has the city really suffered
16 any damages, assuming those wrongs were committed?

17 MR. SHUMAKER: Well, I think that's something that
18 we would need to flesh out in discovery, but I think that the
19 declaratory --

20 THE COURT: Excuse me, but really?

21 MR. SHUMAKER: Well, your Honor, it's -- those
22 claims are still out there.

23 THE COURT: How long -- how long --

24 MR. SHUMAKER: We would -- we would --

25 THE COURT: How long was the city without the funds

1 because of the trap?

2 MR. SHUMAKER: At least a couple of weeks, your
3 Honor, since June. It's complicated because the --

4 THE COURT: So there may be a bit of damages from
5 that maybe.

6 MR. SHUMAKER: There might be some damages from
7 that, correct, your Honor.

8 THE COURT: Maybe. All right. So what you seek by
9 your request to maintain the status quo pending the
10 resolution of the assumption motion is the explicit or
11 implicit -- I'm not sure which -- order that the TRO
12 previously granted is still in effect.

13 MR. SHUMAKER: That would be fine with us, your
14 Honor.

15 THE COURT: Well, I'm asking what you're requesting.

16 MR. SHUMAKER: Well, I --

17 THE COURT: I'm not offering anything. I just want
18 to know what you want here.

19 MR. SHUMAKER: Well, what I think is -- the fact
20 that the automatic stay applies I believe would prevent
21 Syncora from doing what we believe they want to do.

22 THE COURT: Well, if that's your position, it seems
23 to me you ought to think seriously about consenting to the
24 dismissal of the case. Let me hear from Syncora's counsel.

25 MR. HACKNEY: Good morning, your Honor. Stephen

1 Hackney. It's nice to see you again.

2 THE COURT: Mr. Hackney.

3 MR. HACKNEY: So I think you've gone to the nub of
4 some of the issues, your Honor, because I think what is
5 really trying to happen -- what the city is really trying to
6 have happen here is I think they're uncertain as to whether
7 the stay applies, and they're hoping that they can prop up
8 the TRO as an interim measure where they sort out whether --

9 THE COURT: I sort of asked that, and the answer was
10 no.

11 MR. HACKNEY: And I think that to the point that if
12 they believe the stay applies, then there is certainly no
13 need for the TRO. There will be no irreparable harm going
14 forward because the stay will prevent against that. We have
15 been cards on the table with the Court in terms of expressing
16 our views about the stay because we didn't want to come in
17 here and get the TRO dissolved and then pop up later, so that
18 was part of the reason for the lengthy filings.

19 THE COURT: I read what you wrote about that.

20 MR. HACKNEY: I know you've had a lot of filings,
21 but -- we're not trying to weigh you down unnecessarily, but
22 we wanted to be transparent with you. But I guess from my
23 standpoint, your Honor --

24 THE COURT: Well, let's just ask the question --

25 MR. HACKNEY: Yeah.

1 THE COURT: -- since you are willing to be so
2 transparent.

3 MR. HACKNEY: Yes.

4 THE COURT: If, with the city's consent or without
5 it, the Court dissolves the TRO --

6 MR. HACKNEY: Yeah.

7 THE COURT: -- do you intend to notify U.S. Bank to
8 trap casino funds?

9 MR. HACKNEY: So I think that there are two answers
10 to that question, your Honor.

11 THE COURT: Are they both either yes or no?

12 MR. HACKNEY: Ironically, the first one is that it's
13 important to understand about our position on the legal
14 documents that -- and this is actually very important to the
15 way the collateral agreement works is that it doesn't matter
16 whether we notice U.S. Bank to trap or not. This is very
17 important. So under Section 5.4(a)(3) of the collateral
18 agreement, when there is an event of default of which the
19 custodian is aware -- that's U.S. Bank -- it shall not remit
20 money to the city. And the custodian is aware that there are
21 events of default separate and apart from Syncora's letters,
22 which were merely describing its view of the state of the
23 world, because Mr. Orr himself in his proposal to creditors
24 in his presentation on June 14th said there was, so he
25 created that state of mind in U.S. Bank. That is what led to

1 the conversation that we believe happened, which led to our
2 confirmatory letter that under the normal automatic operation
3 of the collateral agreement cash trapping would occur, so
4 that's why I'm prefacing my question of what will Syncora do
5 because our view continues to be that it doesn't matter
6 whether we take action or not. It's something that happens
7 automatically. So I think the -- as to what will we do, you
8 know, I think the answer is that we've expressed our view to
9 you that we do not believe that the stay applies. We've also
10 attempted to describe to you this machinery embodied in the
11 COP's and the swap and the different types of rights we have,
12 so we believe that we have not only enforcement rights
13 directly under the collateral agreement and the swap
14 agreement but also direction rights to the swap
15 counterparties themselves vis-a-vis their rights under the
16 collateral agreement. And while I can't say definitively
17 today what we will do, I do want to represent to the Court
18 that we believe that we would continue to have those rights
19 notwithstanding the stay, so, in an effort to be responsive
20 to your question, I think it's something we could do, but,
21 more importantly, I think it's something that we do not have
22 to do.

23 THE COURT: So that's a definite maybe.

24 MR. HACKNEY: Yeah. But, your Honor, if I could add
25 something, I mean I'm trying not to argue the merits of the

1 dissolution motion, but I think, as you saw, we have very
2 strong feelings about that TRO. I mean that TRO was granted
3 ex parte, and I won't argue the merits, but I think it's
4 already been in place for -- since July 5th, so I think
5 that's something on the order of 45 days. And now the city
6 is saying we think it should be extended another 60 days, and
7 we don't see the merits of it under the classic test, and we
8 also don't believe that it --

9 THE COURT: Well, 60 days from filing, not from now.

10 MR. HACKNEY: Fair point. Fair point, but -- so I
11 really think that what -- I think that we have to just be
12 candid about what's happening here, and I think this is
13 really about the auto stay. I think it's does the automatic
14 stay apply, and you know what, Syncora, if it does, act at
15 your peril because you could be subject to sanctions if you
16 violate the automatic stay, and, city, you know, if there's a
17 question that the automatic stay doesn't apply -- for
18 example, when the city touted the assumption motion, they
19 were talking about the access to the liquidity they would
20 get. I took that by negative implication to suggest if we
21 didn't do the forbearance agreement, there would be cash
22 trapping. So, city, if there's questions about whether you
23 think the automatic stay applies, it's incumbent upon you to
24 file a motion to extend it, but I wanted to add one last
25 thing, your Honor. I'll try not to go on at length, but when

1 I did the conversation with Mr. Shumaker about our motion to
2 dissolve and asked them whether they would consent, this is
3 what I understood them to say. I understood them to say we
4 will stipulate to dissolution. We're not putting the money
5 back, so we had a disagreement there. But what will happen
6 then is U.S. Bank will go back to trapping cash in the
7 interim, and then I take from their papers that they
8 anticipated that they would have then filed, and so if that
9 had happened, as we believe it should have, given the
10 stipulation, then it would have been clearly on the points of
11 the automatic stay. It would have been does the automatic
12 stay apply or does it not. I don't think that there's
13 anything about the passage of time and the fact that the TRO
14 actually didn't get formally dissolved by Judge Zatkoff that
15 should change the essential nature of that legal question. I
16 think that's the appropriate place to leave the parties
17 rather than having this TRO involved, which then leads to a
18 preliminary injunction hearing which requires discovery and,
19 to my mind, is not the real debate between the parties.

20 One last note, your Honor. The motion to dismiss is
21 not fully briefed because not only do we have to get their
22 response, but I think we also are able to reply.

23 THE COURT: Right. Thank you.

24 MR. HACKNEY: Thank you.

25 THE COURT: Well, before you sit down, let me just

1 ask you procedurally whether you are willing to take on in a
2 formal context in this Court and on an expedited basis the
3 extent to which the stay applies to any of the rights you
4 think your client has in the circumstances.

5 MR. HACKNEY: Yeah. So if the TRO were dissolved
6 and we shifted the focus to where we think it was -- where it
7 should be, I would absolutely work with counsel and with the
8 Court to move through an expedited process of resolving the
9 status of the stay, and so if I'm right and cash is trapped
10 in the interim, it would only be the amount of cash that's
11 trapped while that issue is resolved, and we would absolutely
12 work with the Court to meet any schedule you set. You can
13 see we've done work on it already, so --

14 THE COURT: Yes. You've briefed it extensively
15 already.

16 MR. HACKNEY: Yeah.

17 THE COURT: Ms. Calton, did you want to be heard?

18 MS. CALTON: We're representing Defendants Detroit
19 Entertainment, LLC, which is the Motor City Casino, and
20 Greektown Casino, LLC, and I think with respect to what
21 you're discussing today, our desire is pretty easy. We want
22 whatever order is entered to be very clear where we're
23 supposed to pay the money so that we're at no risk of ever
24 having to pay it a second time.

25 THE COURT: Right.

1 MS. CALTON: Okay.

2 THE COURT: I don't think anyone could object to
3 that. One more, sir.

4 MR. COCO: Yes, your Honor. Good morning again.
5 Nathan Coco on behalf of -- on behalf of U.S. Bank in its
6 capacity as custodian under the collateral agreement. Your
7 Honor, as we noted in our response brief that was filed some
8 time ago, U.S. Bank in this capacity is simply a custodian.
9 It is not U.S. Bank's role or discretion under the agreement
10 to decide whether or not there's an event of default, and,
11 you know, there's obviously a live dispute about whether or
12 not the stay applies, whether or not the cash should be
13 trapped or must be trapped. U.S. Bank in this dispute is
14 simply seeking clarification one way or the other. We are
15 trying to avoid a situation much like the casinos where we're
16 subject to conflicting instructions from the city and from
17 Syncora and, you know, are forced to separately seek the
18 Court's decision-making authority on those issues, so --

19 THE COURT: That's a bit inconsistent from what I
20 heard Mr. Hackney say. He said you have obligations once you
21 are aware of a default.

22 MR. COCO: And there is a dispute about whether or
23 not there is an event of default --

24 THE COURT: All right.

25 MR. COCO: -- as I understand it because --

1 THE COURT: That's a different question.

2 MR. COCO: -- because the swap counterparties
3 haven't officially declared a default, but I just want to
4 make sure the record is clear. U.S. Bank is not taking a
5 position that there is or is not. It's an issue that's been
6 presented to the Court by the parties who have an economic
7 interest in this dispute. We just seek clarification to make
8 sure that we're not put in an untenable situation where we're
9 forced to reconcile two conflicting directions.

10 THE COURT: Fair enough, sir. Thank you.

11 MR. COCO: Thank you.

12 MR. SHUMAKER: Your Honor, if I may, briefly. Mr.
13 Hackney was talking about how the collateral agreement works.
14 Of course, your Honor realizes that Syncora, the swap
15 insurer, is not a party to the collateral agreement and not a
16 third-party beneficiary. There's no clause in that agreement
17 nor has there been any default on the swaps payments by the
18 city. And we fundamentally disagree on this position as to
19 whether there is automatic cash trapping of the casino
20 revenues. Mr. Hackney referred to a conversation between Mr.
21 Orr and U.S. Bank. U.S. Bank has filed a paper disavowing
22 Syncora's version of those events, and we strongly believe
23 that the only parties that can -- the only entities that can
24 declare an event of default are the actual parties to the
25 collateral agreement. That would be the swap counterparties

1 and not Syncora.

2 THE COURT: Well, let me ask you the same question
3 that I asked of Mr. Hackney. Are you and your client
4 prepared to address the issue of whether the automatic stay
5 in this case acts to prohibit Syncora from enforcing any of
6 the rights that it thinks it has under whatever the
7 agreements are here?

8 MR. SHUMAKER: Your Honor, I think we would be more
9 than happy to do that. We believe that it would be -- the
10 burden of proof would be incumbent upon Syncora to show that
11 they were entitled to that relief, but the only other thing I
12 would share, your Honor, is that we would still ask that the
13 Court prohibit the -- Syncora from taking steps to get at the
14 city's property, the casino revenues, which are so vital to
15 the city. I mean we're talking if they take actions vis-a-
16 vis U.S. Bank --

17 THE COURT: Well, all right. Fair enough. Let me
18 just put the schedule question to the two of you. I'm
19 available today or we have a hearing -- a regularly scheduled
20 hearing for next Wednesday. We could do it then or some
21 other time. What suits you? Do you want a moment to consult
22 with your --

23 MR. SHUMAKER: If I might.

24 THE COURT: -- staff there? Sir.

25 MR. SHUMAKER: Your Honor, we would be willing to do

1 it on an expedited basis over the next week for the August
2 28th hearing if we were able to have the status quo
3 maintained in some fashion.

4 THE COURT: Sir.

5 MR. HACKNEY: Your Honor, I think that in late June
6 when we thought that we were negotiating an NDA with the city
7 in order to make a proposal if the --

8 THE COURT: Negotiating what?

9 MR. HACKNEY: Negotiating an NDA with the city.
10 That's what we thought we were doing on July 3rd.

11 THE COURT: I'm sorry. Negotiating what?

12 MR. HACKNEY: A nondisclosure agreement. I'm sorry,
13 your Honor. Don't mean to be overly familiar. If they had
14 asked us back then, "Hey, will you stand still while we
15 negotiate this nondisclosure agreement, see if we can work it
16 out, make a proposal?" there might have been a different
17 willingness on behalf of my client to voluntarily stand
18 still, but I think -- I'm not authorized to say that we will
19 voluntarily stand still, your Honor. I certainly will say
20 that we're happy to show up and argue this on August 27th,
21 August 28th if that works with the Court's schedule. My
22 personal view is this TRO, there's not a lawful basis to
23 maintain it for a variety of reasons, and I just don't think
24 that we can just use it as this interim measure. I don't
25 think a week's worth of cash trapping is going to cripple the

1 city, and so -- and by the way, if the TRO stays in place,
2 then you have the preliminary injunction, and we have to
3 schedule the discovery. It's just -- I don't think it's an
4 efficient way to proceed, but we certainly will show up and
5 argue this next week if you'd like us to. I'm not even
6 sure -- I will have to say I'm not even sure when the city
7 gets the next payment discharged from the general receipt
8 subaccount, so I don't know if they're going to --

9 THE COURT: Anybody have an answer to that question?

10 MR. SHUMAKER: I'm sorry, your Honor. I'm sorry. I
11 missed the question.

12 MR. HACKNEY: He wants to know when the next release
13 is to the city.

14 THE COURT: When is the next release from the
15 subaccount?

16 MR. SHUMAKER: It should be on or about the 26th,
17 your Honor.

18 THE COURT: 26th of this month?

19 MR. SHUMAKER: Yes, your Honor.

20 MR. HACKNEY: I was hoping it was.

21 THE COURT: So it's before next Wednesday.

22 MR. HACKNEY: I didn't know if U.S. Bank might know
23 the precise answer to that because it builds up, and then it
24 discharges to them, and so if it wasn't even going to
25 discharge, there is more time, so --

1 THE COURT: Right. Well, I wonder, Mr. Shumaker, if
2 it isn't in the best interest of all concerned to reconvene
3 later this afternoon and have argument on this question.
4 It's certainly been briefed in various filings that the two
5 of you have made. I'm prepared.

6 MR. SHUMAKER: Your Honor, we got their papers
7 setting forth their arguments yesterday, and --

8 THE COURT: Of course you did, but none of it was
9 any surprise to you.

10 MR. SHUMAKER: Well, in terms of their positions on
11 the automatic stay, I believe there were some things in there
12 that were brand new, and we've --

13 THE COURT: Okay.

14 MR. SHUMAKER: You know, I believe that if your
15 Honor believes that's the only way to do it, that's what
16 we'll -- that's what we'll do. We would hope that there
17 would be -- because the automatic stay is in place, we
18 believe, presumptively, that we could do this on --

19 THE COURT: My concern with your relying on the TRO
20 is twofold. I'm not confident, as a matter of law, that it
21 is still in place. I don't know. Second, I'm not
22 comfortable imposing one without all of the process that
23 Rule -- I think it's 65 of the Federal Rules of Civil
24 Procedure requires, which we have not -- or you have not
25 invoked, so I think it's in the city's best interest to get

1 this matter resolved very promptly, and I think it's also in
2 Syncora's best interest, too, because, you know, there's
3 money coming in, and there's money going out.

4 MR. SHUMAKER: And we will do it today then, your
5 Honor.

6 THE COURT: I suppose we could reconvene tomorrow if
7 you think 24 hours will be necessary to help you prepare for
8 it, but, in the meantime, there are risks, right --

9 MR. SHUMAKER: Your Honor --

10 THE COURT: -- and to consult with your people and
11 let me know what you want to do.

12 MR. SHUMAKER: This afternoon is fine, your Honor.

13 THE COURT: This afternoon is fine. Okay. Is that
14 all right with you, sir?

15 MR. HACKNEY: Absolutely.

16 THE COURT: What time would either of you suggest?
17 May I suggest three?

18 MR. SHUMAKER: Three o'clock?

19 MR. HACKNEY: You bet.

20 MR. SHUMAKER: That's great.

21 THE COURT: All right. At three o'clock we will
22 have an oral argument on the issue of whether the automatic
23 stay of either 922 or 362 stays Syncora's enforcement of any
24 of its rights under any of the applicable agreements.

25 MR. HACKNEY: And, your Honor, did you have a view

1 on the dissolution motion and whether we should argue its
2 merits, or is the TRO going to be dissolved?

3 THE COURT: Well, my thought there was to wait and
4 see what the outcome of the stay motion was.

5 MR. HACKNEY: Okay.

6 THE COURT: If the answer to that is there is no
7 stay or it's a limited stay or whatever, then the city may or
8 may not decide to pursue a TRO, and we'll have to figure out
9 how to do that. If the answer is, yes, the stay applies,
10 then I think the city would agree to dissolve the TRO and
11 maybe even dismiss the lawsuit. So is that okay to hold off
12 on that?

13 MR. HACKNEY: Absolutely. The only reason I'm
14 asking is we do technically have a status conference today on
15 the adversary that would normally involve scheduling of
16 things like the preliminary --

17 THE COURT: Right. So let's hold off on that.

18 MR. HACKNEY: Understood. Your Honor, I just want
19 to make one more technical note on the adversary -- on the
20 adversary proceeding just before we leave the podium, which
21 is it's not precisely before you, but I think one thing that
22 we'll have to do is clarify the precise nature of the Court's
23 jurisdiction. There were competing theories of jurisdiction
24 offered to Judge Zatkoff, and Judge Zatkoff merely held that
25 he did have jurisdiction. And I wanted to flag this with you

1 as a potentially important issue to things like mandatory
2 abstention and so forth under Section 1334. It's not before
3 you. I'm merely raising it with you in the means of a status
4 to let you know that we think that may be an issue that has
5 to be resolved.

6 THE COURT: Can you be a little more specific for
7 me?

8 MR. HACKNEY: I sure can. When we removed the case,
9 we asserted that the casino defendants had been fraudulently
10 joined, and in doing so we represented that diversity
11 jurisdiction existed that supported removal. By the time
12 Judge Zatkoff asked for clarification of this, the bankruptcy
13 had intervened, and they filed a motion that said it doesn't
14 matter anymore whether there was removal, and maybe there was
15 diversity jurisdiction. They hedged a bit, but they said now
16 there's related-to jurisdiction.

17 THE COURT: Okay.

18 MR. HACKNEY: So that's good enough for him, but I
19 think for you it will be important for you to decide whether
20 you have either or both and so on and so forth. I'm just
21 making that point now.

22 THE COURT: All right.

23 MR. HACKNEY: Thank you, your Honor.

24 THE COURT: Sir.

25 MR. GOLDBERG: Very briefly --

1 THE COURT: Sir.

2 MR. GOLDBERG: What I'm hearing is that the
3 hearing -- the expedited hearing you're talking about is a
4 hearing on whether the automatic stay applies to post-
5 petition release of the casino tax dollars. Is that correct?

6 THE COURT: Yes, among other things.

7 MR. GOLDBERG: I mean I just want to call attention
8 that in -- I represent party of interest David Sole. We
9 filed an objection to the approval of the forbearance
10 agreement. One of the central arguments in our objection,
11 which we did brief, was --

12 THE COURT: Excuse me, sir. Could you just state
13 your appearance on the record?

14 MR. GOLDBERG: I apologize. Jerome Goldberg, and
15 I'm appearing on behalf of interested party David Sole. We
16 did file an objection to the city's motion for approval of
17 the forbearance --

18 THE COURT: Right.

19 MR. GOLDBERG: -- agreement, and one of the things
20 that we did brief in the objection -- and it goes to the core
21 of our objection -- is whether or not the automatic stay does
22 apply to the -- based on Section 922 and Section 928. And we
23 would appreciate at least consideration going to the
24 arguments we raised in the brief, which we took some time to
25 raise, and --

1 THE COURT: Okay. We will look at that, and if
2 you'd like to be heard this afternoon at three o'clock,
3 that's fine with me as well.

4 MR. GOLDBERG: My problem this afternoon is my wife
5 has cancer surgery next Wednesday, and she does have an
6 important appointment with the doctor. I'm available
7 tomorrow morning to be heard, but I could not be available
8 today.

9 THE COURT: Right.

10 MR. GOLDBERG: But I would appreciate this because
11 we feel it is a very -- we feel this whole issue is a major
12 issue because it deals with interest rate swaps, which we
13 briefed, and that's a -- we're talking about tons of money
14 going to these banks and for what we believe is very little
15 socially useful, but I'm not going to argue our argument
16 there, but obviously the question of whether or not the city
17 is going to have to pay the money goes to whether it's a
18 secured loan. It goes to the status within bankruptcy, and
19 it goes to whether -- it goes to the efficacy and the
20 necessity for this forbearance agreement and any benefit to
21 the city and to the -- against the interest of other
22 creditors like my clients, who are pensioners, who will see
23 less funds available for their pensions because the money is
24 going to the banks when the money does not even have to go to
25 the banks, so I would like to be heard on this question, but

1 I know I'm not available at three o'clock. If there's no
2 other way to reschedule, I appreciate the -- I would at least
3 appreciate that my brief be considered, be looked at. We
4 took time doing it. We feel there are very valid arguments
5 on why the automatic stay does not apply -- I mean does
6 apply -- my apology -- does apply, and, you know, if there's
7 going to be post-briefing on it, we'd like to be involved in
8 that as well.

9 THE COURT: All right, sir. You have my commitment
10 to review that part of your briefs for this afternoon's
11 hearing. Thank you.

12 MR. GOLDBERG: I appreciate it. And it's Docket
13 361.

14 THE COURT: Oh, okay. Thank you. All right. The
15 other item that's on the agenda is a status hearing on the
16 motion to assume the executory contract, the forbearance
17 agreement. Is there anything that anyone would like to bring
18 up in that regard?

19 MR. SHUMAKER: Yes, your Honor. Gregory Shumaker
20 again for the record. Your Honor, last time we met on August
21 2nd, you'll recall that Syncora had asked for a significant
22 amount of discovery relating to the assumption motion. At
23 the end of the hearing, I had informed the Court that the
24 city planned on putting on one or two witnesses for -- at the
25 hearing, and your Honor then ordered that there be -- that

1 depositions of the debtor's witnesses and any exhibits that
2 it proposed to proffer take place. The city did do that on
3 Friday, I believe, and designated three witnesses and put
4 forth its exhibit list and has, in fact, given copies of all
5 of those exhibits pursuant to your order.

6 Syncora has put forth a witness list of ten
7 witnesses, one of whom overlaps, and that's the emergency
8 manager. We've got -- your Honor has set the end of next
9 week for the end of those depositions. We were wondering,
10 your Honor, if that was what you had envisioned for the
11 hearing, that there would be multiple other witnesses. As
12 your Honor knows, it's not supposed to be a mini trial. We
13 want your Honor to be -- you know, have everything it needs
14 to be informed -- fully informed, but that puts into some
15 sort of question the length of the hearing perhaps. I don't
16 know if, you know, September 9th -- if 13 witnesses can be
17 put on that day, but, in any event, we wanted to raise that
18 as a status conference and get your guidance on that and then
19 also sort of the length of the depositions. We have 13
20 objectors on the assumption motion. We'd ask for
21 clarification from your Honor that whatever depositions go
22 forward be limited in length and perhaps that the objectors
23 be asked to coordinate in terms of their timing so there's no
24 duplication of effort for the parties.

25 THE COURT: What limit would you suggest?

1 MR. SHUMAKER: Well, your Honor, you know, a lot
2 of -- I don't know exactly with regard to the Syncora
3 witnesses how long those would take. I was hoping with
4 regard to the three witnesses that the city had put forth,
5 including the emergency manager, given all that's going on,
6 that those be depositions of a half day in length.

7 THE COURT: Thank you, sir.

8 MR. HACKNEY: Stephen Hackney on behalf of Syncora,
9 your Honor. So the first thing I want to say is that the
10 order didn't require us to identify witnesses or disclose
11 documents, but we thought it would be safer to identify any
12 potential rebuttal witnesses now.

13 THE COURT: Well, the reason for that was because
14 you didn't tell me at the last hearing that you intended to
15 call any witnesses.

16 MR. HACKNEY: And I don't have a present intention.
17 It's not a will call list. I mean I don't know what the
18 city's witnesses are going to say in their depositions. I
19 have their affidavits. I have a sense of what they're going
20 to say, but there is water under the bridge yet. We just did
21 it earlier rather than later rather than doing a rebuttal
22 witness list after we take the depositions. That's all we
23 did. I don't have a present intention to call witnesses. I
24 will say I don't fully know enough about the city's case-in-
25 chief on the assumption motion to make that decision. That's

1 a nuance decision. I don't anticipate putting on hours of
2 testimony from Syncora or its financial advisors. I will
3 tell you that four of the names on the list are the service
4 corporation directors who are -- is a party to the
5 forbearance agreement, so those were names that we put on the
6 list as well as potential percipient witnesses. And then we
7 identified a bunch of documents as well, so I'm not -- it's
8 not my intention to hijack your assumption hearing. I agree
9 with the statement that a Court can't resolve third-party
10 rights in the context of assumption or 9019, so it's within
11 the context of that guidance that the Court gave that we
12 were -- that we submitted this list.

13 THE COURT: Are the depositions of the three city
14 witnesses scheduled?

15 MR. HACKNEY: They aren't scheduled, your Honor.
16 Well, that's in part because I didn't want to just fire out a
17 notice and then claim all the seven hours to myself. I've
18 been trying to coordinate and have already had communications
19 with the other objectors, some of them. Our intention is to
20 coordinate a call tomorrow so that the depositions can be as
21 orderly as possible in terms of not having a merry-go-round
22 of attorneys asking questions. And if we can do that, we
23 will, but the one thing I'll say, your Honor, is we won't be
24 able to get the depositions done, I doubt, with all of the
25 objectors in a half day. I think all of the objectors means

1 that we'll need the full seven hours for sure.

2 One last point on the matter of status, your Honor.

3 THE COURT: I don't quite get that given the
4 relatively narrow scope of the issues and the hearing.

5 MR. HACKNEY: I guess, you know, I won't reargue our
6 last interaction with each other on this subject. I guess I
7 will just say that this is a very complicated structure, and
8 the implications of the forbearance --

9 THE COURT: Of course that's true, but nobody argues
10 about the structure. The structure is what it is. It's in
11 the documents.

12 MR. HACKNEY: Agreed; agreed. But I also think the
13 implications, the analysis of the structure, of the city's
14 need for cash, of the validity of various things, is a
15 factual question that I know different objectors are going to
16 want to inquire --

17 THE COURT: All right. But that's a different
18 question than the question of the structure.

19 MR. HACKNEY: That's a fair point. It's just that
20 the complexity of the structure bleeds over somewhat into the
21 factual inquiry we do need to make in terms of have they run
22 their traps properly in order to try and get this deal
23 approved because they are contending that this will lead to
24 performance, so -- and, your Honor --

25 THE COURT: You're talking about 21 hours of

1 depositions just on the city's side in a hearing that I was
2 thinking of allocating each side three hours to try.

3 MR. HACKNEY: With the objectors grouped as a class?
4 Well, remember, your Honor, I think that I will say part of
5 the value of the depositions happening outside of the
6 courtroom is that it streamlines the presentation before the
7 Court. I mean cross-examination gets a lot crisper when you
8 have the time to clarify and there's not as much fumbling
9 around in the courtroom, so I'm not sure that the deposition
10 will run contrary to your desire to run a tight hearing. I
11 think it may accentuate it.

12 THE COURT: Thank you, sir. Does anyone else want
13 to be heard on these issues?

14 MR. HACKNEY: Your Honor, if I could raise --

15 THE COURT: Oh, is there more?

16 MR. HACKNEY: I'm sorry.

17 THE COURT: I'm sorry. I'm sorry.

18 MR. HACKNEY: No. That's okay. I try not to go on
19 at length. I wanted to clarify one thing. There's been
20 these repeated references to the data room as being something
21 that they've provided to us, and I just want to confirm that
22 it is being deemed discoverable and responsive to our
23 requests. The reason for this is important. Everyone had to
24 sign an NDA to go into the data room meaning --

25 THE COURT: Nondisclosure agreement. Got it.

1 MR. HACKNEY: Nondisclosure agreement. I'm going to
2 write that on my forehead this evening so --

3 THE COURT: No, no, no.

4 MR. HACKNEY: -- I see it every time I look in --

5 THE COURT: You can use the letters from now on.

6 MR. HACKNEY: Yeah. No.

7 THE COURT: I got it now.

8 MR. HACKNEY: I will try to be less euphemistic.
9 I'm sorry. Under the nondisclosure agreement, you can't
10 disclose the information from the data room in court, to
11 witnesses, et cetera, unless the city agrees with you that it
12 is discoverable by other means, in which case now it can be
13 used in court proceedings. I think that that's happened, and
14 I just want to clarify that that's happened because that's
15 going to facilitate depositions, filing of briefs before the
16 Court, and the execution of this hearing and a bunch of other
17 ones before you. I don't think they put any privileged
18 information in that room, so there's -- it's financial
19 information of the city, so I think it should be
20 discoverable.

21 THE COURT: All right. I will get around to putting
22 that question to the city.

23 MR. HACKNEY: Thank you.

24 MS. ENGLISH: Good morning, your Honor. Caroline
25 English from Arent Fox. We represent Ambac, and we filed an

1 objection. We, like Syncora, also at this point do not
2 anticipate the need to put forth rebuttal witnesses and
3 exhibits at the September 9th hearing, but based on what we
4 hear from the city's witnesses during depositions, it's
5 possible, and so we would like to request that a schedule be
6 entered allowing us after the conclusion of those depositions
7 to disclose any rebuttal witnesses and exhibits we might like
8 to offer during the evidentiary hearing and then allow the
9 city, if necessary, to depose our witnesses as well. I'll
10 also --

11 THE COURT: That would require that the depositions
12 take place like tomorrow, all three at the same time.

13 MS. ENGLISH: Well, I think we have an extra week
14 built in. The depositions of the city witnesses are supposed
15 to conclude by August 30th, I believe, and I think the
16 trial -- or the hearing is the 9th, so we do have the week of
17 Labor Day. We could squeeze in some extra depositions if
18 necessary. Again, we don't anticipate that it'll be
19 necessary, but we couldn't say for sure, and we need to
20 reserve the right to call any witnesses as we see fit after
21 we depose the city's witnesses.

22 THE COURT: All right. Thank you.

23 MS. ENGLISH: Thank you.

24 THE COURT: Sir.

25 MR. PEREZ: Good morning, your Honor. Alfredo

1 Perez. I represent FGIC. Your Honor, in connection with our
2 limited objection, we did file two declarations. One was my
3 declaration just attaching the documents that we relied on,
4 so I don't think that's an issue, but we did file a very
5 short declaration for Stephen Spencer on kind of two issues,
6 and that would be our direct testimony of him to the extent
7 the hearing goes forward. So I don't know if anybody wants
8 to question him about that, but that -- you know, those two-
9 or three-page declaration would be our direct testimony of
10 him.

11 THE COURT: If you haven't already, perhaps you
12 could work with the city on seeing if they would be willing
13 to have that declaration be admitted in lieu of testimony.

14 MR. PEREZ: Okay. I will do that, your Honor.

15 THE COURT: Would anyone else like to be heard?

16 MR. GORDON: Good morning, your Honor. Robert
17 Gordon of Clark Hill on behalf of the Detroit Retirement
18 Systems. I just thought this might be the right time to echo
19 the sentiment of Mr. Goldberg. I don't know what's going to
20 get argued in oral argument regarding the stay this
21 afternoon, but we did in our papers raise the issue of
22 whether the lien asserted by the swap participants actually
23 extends to the post-petition casino revenue, so there could
24 be an issue there relative to whether there would be a basis
25 for even arguing whether the stay applies or doesn't apply,

1 so we just want to make sure that the Court is aware of that.

2 THE COURT: Thank you.

3 MR. GORDON: Thank you very much, your Honor. And
4 other than that, I echo Mr. Hackney's suggestion that all
5 objectors would somehow in a very efficient way hopefully be
6 able to participate in the same discovery so no one is
7 duplicating each other. Thank you.

8 MS. BRIMER: Good morning, your Honor. Lynn M.
9 Brimer appearing on behalf of the Retired Detroit Police
10 Members Association. Your Honor, we filed a limited
11 objection chiefly concerned that, as the Court is aware,
12 there was a retiree committee formation meeting yesterday.
13 The committee was -- will be appointed at the request of the
14 city, and to just request that the Court ensure whatever
15 scheduling order the Court puts in place takes into
16 consideration the opportunity for committee and committee
17 counsel to address these what are going to be ultimately very
18 significant issues to the ability of the city to honor its
19 pension obligations.

20 THE COURT: Thank you for reminding me of that.

21 MR. MARRIOTT: Good morning, your Honor. Vince
22 Marriott, Ballard Spahr, on behalf of EEPK. If you remember,
23 they're the unpronounceable --

24 THE COURT: I do.

25 MR. MARRIOTT: I rise only to address the notion

1 that it would be half-day depositions as opposed to full-day.
2 Not all of the objections raise the same issues. I mean
3 there is some overlap, but there's also some independent,
4 depending upon who's objecting --

5 THE COURT: Right.

6 MR. MARRIOTT: -- so that it is not as though a
7 single lawyer could be designated to handle all of the
8 questioning, so I think that given the lack of overlap among
9 the objections, I think a full day would be appropriate, not
10 half. Thank you.

11 THE COURT: Thank you, sir.

12 MR. GOLDBERG: Your Honor, Jerome Goldberg appearing
13 again on behalf of Mr. Sole. We also did file a declaration
14 with our objections of the declaration of David Sole based on
15 a thorough review of the swap documents based on a previous
16 FOIA we had done, and if -- we are very amenable to that
17 declaration being entered in lieu of any testimony and will
18 check with -- as you instructed the other attorneys, we could
19 check with the others. If they want to talk to -- depose Mr.
20 Sole, we would clearly make him available.

21 THE COURT: All right.

22 MR. GOLDBERG: If I could maybe visit one issue, and
23 I apologize for -- I sat thinking about this. I am available
24 tomorrow morning to be part of this argument on the automatic
25 stay, which I think is a very important argument, and if

1 there was any way to reschedule -- I just am absolutely not
2 available this afternoon. I'm pledged to -- family comes
3 first obviously, but I could make myself available tomorrow
4 morning or Friday for the argument on the stay if that's
5 possible. Thank you.

6 THE COURT: Well, I certainly appreciate your
7 interest in this issue and your client's, of course, and your
8 personal circumstances, but I think it is in the best
9 interest of all concerned to proceed this afternoon, so
10 that's what we're going to do.

11 MR. GOLDBERG: If I could have a representative who
12 works with me appear, that would be okay.

13 THE COURT: Absolutely.

14 MR. GOLDBERG: Okay. I appreciate it. Thank you.

15 THE COURT: Absolutely. Anyone else?

16 MS. CALTON: For clarification, your Honor, will the
17 status conference in the adversary proceeding be resumed this
18 afternoon or set for some other day?

19 THE COURT: What more did you think we needed to
20 accomplish?

21 MS. CALTON: Well, I don't know that we need to
22 accomplish, but if there's going to discuss discovery and
23 scheduling and briefing or is it really just going to be the
24 stay argument?

25 THE COURT: Well, you raise a good point. It is

1 possible that if the Court holds that the stay does not apply
2 and the city wants to go ahead with the adversary and
3 including the TRO, there may be some scheduling issues
4 discussed at that time.

5 MS. CALTON: Okay.

6 THE COURT: Okay? Okay. Mr. Shumaker.

7 MR. SHUMAKER: Yes, your Honor.

8 THE COURT: What's your answer to Mr. Hackney's
9 question?

10 MR. SHUMAKER: His question is -- there were
11 several, your Honor. I'm sorry.

12 THE COURT: Well, his question about the data room
13 being discoverable and, therefore, not subject to your NDA.

14 MR. SHUMAKER: Right. The reason that the NDA's
15 were necessary, your Honor, is because there's a number of
16 sensitive financial documents, projections that are in the
17 data room that the city strongly believes should not be
18 disseminated unless there's an NDA in place. We have
19 provided the parties with all of the documents that we've --

20 THE COURT: I have to ask you to pause there with
21 this very general question, which is in bankruptcy why isn't
22 every piece of paper not privileged discoverable by any
23 creditor?

24 MR. SHUMAKER: Well, your Honor, I think the answer
25 is if it's -- it might be discoverable, but it would -- it's

1 possible it would be provided to the Court under seal if
2 there was competitively sensitive information in there
3 that --

4 THE COURT: Competitively sensitive?

5 MR. SHUMAKER: Well, I mean sensitive financial
6 information.

7 THE COURT: These days.

8 MR. SHUMAKER: I'm sorry, your Honor.

9 THE COURT: What do you mean? What do you mean?
10 Give me an example.

11 MR. SHUMAKER: Well, there are --

12 THE COURT: Give me an example of a document that
13 parties can see but you don't want disseminated, whatever
14 that means.

15 MR. SHUMAKER: Your Honor, there are cash
16 projections relating to the city's financial future. There
17 are expert reports.

18 THE COURT: Okay. Stop there. Financial
19 projections. Why are they sensitive?

20 MR. SHUMAKER: They have --

21 THE COURT: Doesn't the city want every one of its
22 citizens to see what the city's financial future is projected
23 to look like?

24 MR. SHUMAKER: Yes, your Honor, but --

25 THE COURT: What's the problem?

1 MR. SHUMAKER: There are a lot of different
2 scenarios that are played out in those projections which,
3 again, the city has believed is it would not be in its best
4 interest to be disseminated in public.

5 THE COURT: Okay, but why not?

6 MR. SHUMAKER: Because we believe that the --

7 THE COURT: What would be the harm to the city's
8 interest if that happened?

9 MR. SHUMAKER: Yes, your Honor.

10 THE COURT: What would the harm be?

11 MR. SHUMAKER: Your Honor, you know, it's hard to
12 imagine the different scenarios that might develop with some
13 of the information that would suggest certain things. That's
14 why we proceeded in this fashion.

15 THE COURT: Well, generally speaking, speculation
16 and conjecture are not the basis for confidentiality, are
17 they?

18 MR. SHUMAKER: That's true, your Honor.

19 THE COURT: Now, you moved on to expert reports.
20 Those are discoverable, in any event, aren't they?

21 MR. SHUMAKER: Your Honor, I mean I guess there's
22 also a relevancy concern. I mean a lot of this
23 information --

24 THE COURT: This is bankruptcy. What's not
25 relevant? All right. I'm going to -- I'm going to just

1 pause this inquiry now because I sense the need for it.
2 We're going to reconvene this question also at three o'clock
3 because I want you to seriously consider with your colleagues
4 and your client the extent to which confidentiality is
5 necessary and appropriate for what's in your data room, and
6 at that point you can give me a more specific answer.

7 MR. SHUMAKER: Thank you, your Honor.

8 THE COURT: And that'll work for you, too, Mr.
9 Hackney.

10 MR. HACKNEY: It will.

11 THE COURT: All right. All right. So what else?
12 Okay. So I guess I need to make a decision about the length
13 of depositions. I am persuaded that the depositions of the
14 three city witnesses should be permitted for six hours, and
15 the Court will allow that. It is the Court's hope and
16 expectation that these depositions can be scheduled as
17 promptly as possible so that parties opposing the motion can
18 determine the extent to which they will put on rebuttal
19 testimony. In the circumstances, the Court will order the
20 disclosure of rebuttal witnesses 24 hours after the
21 conclusion of the last of the three depositions, and then the
22 city will have an opportunity to depose them if it sees fit.
23 Having said that, it is still the Court's strong intent to
24 proceed with the hearing on the date it set. Anything else
25 we can do between now and three o'clock? Sir.

1 MR. NICHOLSON: Michael Nicholson appearing for
2 International Union, UAW. I won't be able to be here at
3 three o'clock, your Honor, because of a prior commitment, but
4 I did want to report to the Court that with respect to the
5 NDA, the nondisclosure agreement, in meetings leading up to
6 the filing, we raised the very same questions the Court
7 raised and really didn't get a satisfactory answer. We said
8 why shouldn't retirees, our members, citizens, be allowed to
9 know what's going on, and we were told we wouldn't get
10 certain information unless we signed the NDA. We refused to
11 do that. We still have not signed the NDA. I think the
12 Court's concern is very appropriate. Thank you.

13 THE COURT: All right. I do have one more thing to
14 put on the agenda for three o'clock, which is the issue that
15 I raised about how much time each side should be allowed to
16 present evidence at the hearing. I'd like for you to suggest
17 some answer to that question to me at that time. Anything
18 else anyone have at this time? All right. We'll be in
19 recess until three o'clock.

20 THE CLERK: All rise. Court is in recess.

21 (Recess at 11:16 a.m., until 3:01 p.m.)

22 THE CLERK: All rise. Court is in session. Please
23 be seated. Recalling Case Number 13-53846, City of Detroit,
24 Michigan, and Case Number 13-04942, City of Detroit versus
25 Syncora Guarantee, Incorporated, et al.

1 THE COURT: Okay. Let's address the automatic stay
2 issue.

3 MR. SHUMAKER: Your Honor, could I interrupt with
4 two preliminary matters if it's okay?

5 THE COURT: Sure.

6 MR. SHUMAKER: My colleague, Ms. Ball, is going to
7 argue the stay motion, but two things I wanted to get back to
8 your Honor on. One of them was, in light of your Honor's
9 willingness to have this hearing so quickly this afternoon, I
10 wanted to indicate that the city is willing to dissolve the
11 TRO, so prior to the automatic stay motion being heard we
12 thought we should tell you that.

13 The second thing is with regard to the data room. I
14 wanted to be very clear that the city very much agrees with
15 your Honor that this is -- we should be as transparent as we
16 possibly can be with regard to documents affecting the city
17 and its citizens, and what we would propose, though, as much
18 as we agree with that, there are some documents -- we talked
19 about the 70,000 or so pages that are in that data room over
20 the break, and there are certain documents that we have
21 concerns about. There's really kind of two categories. One
22 is documents that involve individual privacy issues. There
23 are some documents relating to different employee salaries,
24 compensation, benefits, Social Security numbers and whatnot
25 that we would be very reluctant to have disseminated publicly

1 for obvious reasons.

2 And then, secondly, in connection with sort of some
3 of the pension assessments, the city agreed to an agreement
4 with Milliman, which is a pension actuary, and as part of the
5 city's agreement we agreed to an NDA with Milliman, so anyone
6 who has come into the data room since then can get access to
7 the Milliman documents but also has been required to sign an
8 NDA. We're happy to talk to Milliman about that, but that
9 was the other category that we were concerned about that
10 was -- obviously had some sensitivity as well. What we would
11 propose is that if -- if it was all right with your Honor,
12 that we go through, cull out any of those documents that we
13 have those concerns about, and approach your Honor with a
14 motion for a protective order very, very quickly. We don't
15 think any of this stuff has any relevance to the ongoing
16 assumption motion, but if we determine that the protective
17 order motion has to be filed, to get it filed in the next day
18 or two and then come back perhaps next Wednesday, if your
19 Honor was amenable to that, to argue that if there were
20 certain documents that we thought really should remain under
21 seal and require further protection.

22 MR. HACKNEY: That makes sense to me, your Honor. I
23 think it switches the burden a bit. Instead of saying it's
24 all confidential until it's not, it says it's all not
25 confidential unless it should be.

1 THE COURT: All right. So this will solve the issue
2 you raised initially about discoverable material. Yes?

3 MS. CALTON: Judy Calton for Detroit Entertainment
4 and Greektown Casino. We've been told that my clients aren't
5 eligible for the data room; that they won't tell the criteria
6 for who is eligible for the data room, which this may be
7 great for these two parties, but it doesn't help for the rest
8 of us. I don't know what the criteria is for who can have
9 access.

10 MR. NEAL: If I could -- good afternoon, your Honor.
11 Guy Neal, Sidley Austin, for National Public Finance
12 Guarantee Corp. I rise to address the Milliman issue. The
13 city has taken the position that in order for parties in
14 interest and creditors to have access to these actuarial
15 reports and valuations of their post-employment benefits,
16 OPEB's, that you need to release Milliman. You have to
17 execute a third-party release. We have not executed that
18 release. We don't believe it's appropriate that we need to
19 enter into a release in order to obtain these materials. If
20 Mr. Shumaker's opinion --

21 THE COURT: Of what?

22 MR. NEAL: Excuse me. Release of any and all claims
23 that one may have against Milliman. I'm not saying we have
24 claims, but I'm not sure why one needs to release a party in
25 order to get access to information that may become public.

1 If it's the city's position that they're going to arrive at
2 a -- they're going to evaluate what needs to be public and
3 what needs not to be public by the next hearing, we're happy
4 to work with the city on that. If they have a stated
5 position that they're going to hold firm to this third-party
6 release and the parties need to sign it, I'd like to have
7 that addressed today.

8 MR. GORDON: Good afternoon, your Honor. Robert
9 Gordon on behalf of the Detroit Retirement Systems. I would
10 echo the comments of Mr. Neal on that point. There already
11 have been also, just for the Court's edification, releases or
12 information provided by the city about some of those
13 Milliman, quote, unquote, reports, and I use that term
14 loosely because I don't believe they are reports. They are
15 letters, they are analyses, but they're not actuarial
16 reports. But, for example, there was a June 4 letter from
17 Milliman that was in that data room that was subject to these
18 confidentiality agreements, but then there's been information
19 released by the city about those reports, so there's
20 additional issues about whether things that are in that data
21 room and that might have been arguably at one time subject to
22 confidentiality are still subject to it, so I welcome having
23 that discussion at next week's hearing. I don't think anyone
24 will be prejudiced in the interim. Thank you.

25 MR. SHUMAKER: And, your Honor, that is what I was

1 talking about is that the city was required to enter into
2 this contract with Milliman, and that's who we would like to
3 talk to about addressing the concerns that were just raised
4 about those documents. As to the initial --

5 THE COURT: Well, before we move on from that,
6 please ask the people with this firm that if they're not
7 willing to excuse what is apparently your contractual
8 requirement to get a release from the people who see their
9 work product, they need to come to court next week and talk
10 with me about it.

11 MR. SHUMAKER: Be happy to do that, your Honor. And
12 then as to access to the -- to I think it was Detroit
13 Entertainment, again, considering that this is the approach
14 that we think should be taken, they would get access like any
15 other objector or party.

16 THE COURT: All right. So we'll look forward to
17 your motion in the next day or so. Ms. Ball.

18 MS. BALL: Thank you, your Honor. Good afternoon.
19 Corinne Ball on behalf of the City of Detroit. Your Honor, I
20 rise to do a number of things, but I thought it might be
21 helpful, with the Court's indulgence, if I provided the
22 context in terms of the nature of the asset that we're
23 talking about this afternoon. The casino tax revenues are
24 probably the highest quality revenue stream the city has. It
25 certainly is one of the largest and we believe the most

1 stable tax stream that the city has generating in excess of
2 175 million a year and forecast to generate roughly that much
3 in at least each of the next ten years. Being able to use
4 this valuable revenue stream is pivotal to the overall
5 resolution of this case and the rehabilitation of the city.

6 Another point that's been bouncing -- perhaps we
7 could assist the Court -- are the numbers that have been
8 discussed in connection with the swap, and your Honor may
9 wonder why. With these particular swaps, which are between
10 the counterparties and the service corporations, the
11 termination value, your Honor, floats inversely with interest
12 rates, so as interest rates rise, the termination value is
13 reduced so that as of now I am told the discounted price to
14 free up this revenue stream is less than 200 million and, in
15 fact, estimated at 190 million. To date I think there has
16 been no debate in any of the three litigations involving the
17 casino revenues that if the swap obligation is discharged,
18 the lien on these revenues is released. I also think there
19 is no debate that Syncora has not paid anything on the swaps
20 and that there are no amounts due.

21 Moreover, your Honor, absent the forbearance
22 agreement, were the swap counterparties to exercise their
23 alleged rights under Section 560 to terminate the swap, by
24 our calculation, as is reflected in Mr. Orr's affidavit,
25 Syncora's exposure is capped at \$27 million.

1 Your Honor, as is obvious to me but sometimes not as
2 obvious to others given the pendency still of litigation and
3 the fact that the city has no assurance that the settlement
4 with the counterparties will be approved, it may, in fact,
5 flounder or fail. As is obvious from the 13 objections filed
6 to date, there are key issues as to which the city is not
7 prepared to concede any of these points today, since it
8 doesn't know where the settlement will end up, but certain
9 issues, your Honor, we think may be raised this afternoon,
10 and I wanted to share with you our view that we'd like to
11 make certain assumptions during our argument this afternoon.

12 Key among those issues which are being settled,
13 should the settlement and assumption motion be approved and
14 succeed, is are the casino wagering tax revenues special
15 revenues within the meaning of 9022. There is dicta in the
16 Jefferson case cited by Syncora, and, your Honor, I know
17 there are three JeffCo decisions that have been cited
18 frequently with you. I'm referring to the decision on the
19 receivership, which is reported at 474 B.R. 28, suggesting
20 that a revenue picture like ours it may or may not be special
21 revenues, so we are reserving that issue.

22 Obviously, your Honor, we're also not prepared to
23 concede that the swap is valid or that the pledge of the
24 revenues are valid, but having from the outset reserved on
25 those issues, we think we can still address the stay's

1 applicability to the wagering tax revenues.

2 I was impressed by Syncora's statement of yesterday
3 where for the first time they asserted that the casino tax
4 revenues, the wagering tax revenues payable by casino owners
5 to the city, are not property of the city, and for that
6 proposition -- and your Honor will have to excuse me because
7 we'll be referring to New York cases a lot this afternoon as
8 many of these documents are governed by New York law -- they
9 point to cases which there's only one common theme among the
10 escrow cases cited by Syncora in support of that proposition,
11 and the common theme is you have to go to the underlying
12 agreement, and you have to look at it and see what it says.
13 So if we go to the key agreement, which is the collateral
14 agreement, which, as your Honor knows, Syncora is not a party
15 to, the agreement has a definition of pledged property in
16 Section 1.2, which keys into the definition of revenues that
17 are pledged and ultimately to the city's tax -- wagering tax
18 revenues. So I think that the agreement is fairly clear that
19 these revenues are property of the city, and the remedy
20 section -- and, in particular, Section 11(c) of that
21 collateral agreement -- confirms that the revenues remain
22 property of the city in these accounts and cannot be accessed
23 except with an appropriation by the city of its revenues to
24 that purpose. So I think this agreement, were one to read
25 it, is fairly clear that these revenues are remaining

1 property of the city. But I think we would then turn, your
2 Honor, beyond the agreement to the decision again by Judge
3 Bennett in ruling on the receivership motion. You may recall
4 that the monolines and other warrant holders in that case
5 sought to restore the receivership in the context of
6 Jefferson County's Chapter 9. Judge Bennett spent a very
7 thoughtful opinion, and in that he concluded that the pledged
8 revenues, even though in possession of a receiver appointed
9 by a state court, remained property of the Chapter 9 debtor
10 and, as your Honor knows, ultimately did not restore the
11 receivership and did say that these properties are protected
12 by the stays of 362(a) and 922. So I think we have the
13 general proposition look to the agreement as well as a very
14 specific one in Chapter 9, and that was an exceptionally
15 well-reasoned opinion.

16 I also think, your Honor, that there should be no
17 doubt that the casino tax revenues, technically wagering tax
18 revenues, are taxes within the meaning of Section 922(a)(2),
19 which has a very specific reference to taxes being protected.
20 While we're not prepared to concede, as I indicated already,
21 your Honor, that casino revenues are special revenues,
22 assuming arguendo for this afternoon that they are special
23 revenues within the meaning of Section 9022, there's still
24 two problems. It's not clear to us that Syncora has
25 standing -- since it's not a secured party and it cannot

1 apply these revenues, that it has standing to raise or to be
2 within the protection of 922 at all. It's not a party.
3 These properties were not pledged to them. But more
4 importantly, if one actually looks to the words of 922,
5 literally it says that the stay does not apply to the
6 application of special revenues to the payment of
7 indebtedness. As I think I've already shared with your
8 Honor, there are no amounts owing under the swap, and there
9 is no indebtedness remaining to be paid currently due on the
10 swaps, so we think reliance on 922(d) is misplaced for two
11 reasons.

12 And, your Honor, if I -- I thought it might be most
13 helpful if I went to 922(a)(2) first -- it's a very narrow
14 argument -- and then if your Honor would still like us to
15 argue the applicability of 362(b)(17), we're prepared to do
16 that. I don't think there's any debate that wagering taxes
17 are taxes.

18 I also think, your Honor, that the 11th Circuit in a
19 case called In re. Patterson -- and perhaps at this point,
20 your Honor -- I have assembled a listing of the authorities
21 that I'd be using. Would it be helpful to the Court so that
22 I don't have to keep reporting them -- I also have some for
23 Syncora. May I approach, your Honor?

24 THE COURT: Yes.

25 MS. BALL: Your Honor, the 11th Circuit case named

1 In re. Patterson, the 11th Circuit has told us that a credit
2 union's action to freeze revenues constitutes a violation of
3 the stay as an act to enforce a lien. That particular
4 passage appears at 967 Fed. 2d at 512. We also have one of
5 your colleagues from the Southern District of Ohio in a case
6 called In re. Figgers. In that case, the Court was
7 confronted with a refusal to release funds, which the Court
8 similarly found a violation of the stay as a prohibited
9 enforcement and collection action. So, your Honor, I think
10 we now have freezing or refusing to release is enforcing a
11 lien, and we have taxes, so plain meaning for this
12 afternoon's purposes, the casino wagering tax revenues --
13 there should be a stay protecting them from enforcement of a
14 lien.

15 Now, what else do we know about a stay under Chapter
16 9? Again, thanks to Judge Klein in Stockton --

17 THE COURT: Well, the question that Syncora raises
18 is how is U.S. Bank's act in allowing the funds in the sub
19 account to accumulate rather than to turn it over to the city
20 a violation of the stay, an exercise of control --

21 MS. BALL: Your Honor, I think --

22 THE COURT: -- assuming it is property of the
23 debtor?

24 MS. BALL: I think, your Honor, that's the Southern
25 District of Ohio. That's enforcement of lien, refusing to

1 release revenues. Similarly, your Honor, I think that
2 Syncora has somewhat overstated the Supreme Court's ruling in
3 Strumpf. Your Honor may recall that the Supreme Court did
4 find in Strumpf that freezing revenues for a short duration
5 was not a violation of the stay, but it was really a stopgap
6 measure, if one looks at that case at 516 U.S. 19 and 20, to
7 get to the Bankruptcy Court to seek relief from the stay.

8 Your Honor, U.S. Bank has been releasing revenues
9 without a hitch until June 17th when communication started
10 from Syncora. There were -- all of the events that were
11 alleged in Syncora's papers had all -- many had occurred
12 before then, but a custodian has a view. I wouldn't be
13 surprised at all. The documents only protect them if they
14 rely on the directions of the swap counterparties as the
15 secured party. As part of the forbearance agreement, your
16 Honor may recall those swap counterparties consented to the
17 continuing release of those funds to the city. Query, would
18 U.S. Bank ever had changed releasing revenues which it had
19 been doing since the emergency financial manager was
20 appointed in March, it had been doing for over a year when
21 there was an intervening credit rating downgrade? It was
22 doing what the secured parties wanted it to do until a
23 communication from Syncora, and the nature of those
24 communications, your Honor, are probably beyond this
25 afternoon, but they were peppered with words like "demand

1 that you hold." It was not "look to your agreement." And
2 if, in fact, 922(a)(2) applies, if this matter of law does,
3 and we would submit to your Honor on these facts it does,
4 then there are no exception -- the 362(b) exceptions that are
5 being argued by Syncora, they don't apply in Chapter 9.
6 There has to be another basis to come to your Honor and seek
7 relief from the stay. 362(c), (d), and (e) apply, but (b)
8 doesn't. So if we're in Chapter 9 stay world, I think U.S.
9 Bank has to think about it. I think Judge Klein and Judge
10 Bennett, both in Stockton and all three JeffCo cases, have
11 underscored that the exceptions to the automatic stay that
12 one would classically rely on, police power, 362(b), do not
13 apply, so in construing that agreement, I think -- which no
14 one has done and the custodian has zero obligation to do, a
15 fact -- that's the position it has espoused in filings in the
16 adversary proceeding now pending before your Honor, so we
17 know, your Honor, that if a Chapter 9 stay applies,
18 362(b)(17) doesn't.

19 Now, if I were to take a detour with your Honor's
20 indulgence -- bear with me because there is a critical
21 difference between 362(b) and Section 560. The way the
22 exceptions work in the safe harbor world it appears to us --
23 it appears to me first from Judge Shannon's decision in
24 SemCrude where he actually took the lead -- he took the
25 general proposition that the automatic stay is very broad

1 relying on Timbers and Midatlantic and said that exceptions
2 really have to be construed extremely narrowly. I think we
3 know that from him, but he looked at the safe harbors, and I
4 want to get back to 560. It is relevant to the Chapter 9
5 stay. He looked at the safe harbors as saying it kind of
6 works as a package, but fundamentally it's about offset
7 netting and the termination of qualifying financial
8 contracts. In Judge Shannon's SemCrude case, your Honor may
9 not be aware of the facts, but it involved what the Wall
10 Street types call a triangular setoff, which means that if
11 one of the nondebtor parties' affiliates owes an obligation,
12 they can set off -- I mean one of the debtor's affiliates
13 owes the counterparty an obligation, they can set off the
14 debtor's property. The contract said that was totally
15 permissible. They look to 362(b)(17), contract right, we're
16 exercising this. Judge Shannon, who was affirmed in his
17 decision, said, no, very narrow exception. You still have to
18 fundamentally be entitled to set off or exercise the rights
19 that you're seeking to exercise.

20 So why do I want to get back to 560? 560, 561, 559
21 are the part of the safe harbors. If your Honor looks to the
22 language of 560, unlike the language of anything in 362,
23 including 362(o), 560, were the swap counterparties to
24 actually be terminating the swap, says right in it -- and I
25 quote, your Honor -- that they have a right to do so

1 notwithstanding any provision in this title, meaning
2 including, I would argue, 922(a)(2) if it were the swap
3 counterparties who were, in fact, terminating the swap. They
4 have something they can point to. 362(b) has no such
5 reference to notwithstanding anything else in this title.
6 362, including 362(o), operate subject to Chapter 9. So I
7 think that when we think of the decisions, your Honor, that
8 have really looked at this issue and they are, when one
9 thinks about the qualifying financial contract decisions,
10 outside of Chapter 9, you have to start, as I said, with
11 Judge Shannon's decision in SemCrude on the triangular
12 merger.

13 Shortly after that, Judge Peck would follow again.
14 He, too, encountered very creative arguments that banks and
15 financial parties raised to say that they were arguing --
16 they were asserting a contractual right that enabled them to
17 squirt through this very narrow exception of 362(b)(17). So
18 even if we were only operating under the automatic stay, I
19 think we have to look to Judge Peck's ruling against
20 Swedbank, and, your Honor, that's reported on the list that I
21 have given you at 433 B.R. 101, and that was affirmed. And
22 Judge Buchwald in affirming that decision went at length
23 through the legislative history of the safe harbors, and, in
24 fact, relied on Dewsnup, the Supreme Court decision, to say
25 we have to pay attention to the fundamental principles. If

1 this was designed for a setoff and a termination, that's the
2 only time it can be used. So Swedbank that got the bright
3 idea that it could have had a contractual right to do more
4 than that was found to have violated the stay and directed to
5 release to Lehman the monies it was holding.

6 Shortly after that a name familiar to this Court,
7 Bank of America, would try something very similar against
8 Lehman. They said, "Gee, we also have a contract right to
9 take your monies wherever we're holding it and apply it to
10 your debt. And since we're involved in a swap, we should be
11 able to do that." And, your Honor, that case was cited in
12 our statement to you of earlier this week. And Judge Peck
13 said, "Wait a minute. No. You are not within the safe
14 harbor, and you shouldn't have done that. You should have
15 come to me first and demonstrated your entitlement to relief
16 from the stay." Failing that, he found that they had, in
17 fact, violated the stay.

18 You would then have the opportunity -- and Lehman
19 gave Judge Peck many opportunities to deal with the safe
20 harbors, your Honor. Forgive me for reverting to New York
21 decisions so often, but he would then have to deal with
22 another triangular setoff case with UBS. In the list of
23 authorities I've given you, your Honor, that's the Lehman
24 case that is followed with the initials UBS. Again,
25 following Judge Shannon's lead, no, your contract may say --

1 or you can argue till you're blue in the face your contract
2 says you can do that, but that is not permitted. That is not
3 a right that should be recognized. It's beyond the
4 termination of a swap and going against collateral.

5 The case that probably gets the most press -- and it
6 was not reported, your Honor, so I don't know your rules
7 regarding an unreported decision. It was a decision in the
8 transcript of Judge Peck. In that case, a financial party
9 known as Metavante had relied on a provision in the ISDA
10 master swap. It's very interesting. Metavante was, in swap
11 vernacular, out of the money, which meant that Metavante
12 should have been paying monies periodically into the debtor.
13 Metavante said, "Wait a minute. Safe harbor. I have the
14 right -- I have the right to terminate the swap, and I
15 haven't decided whether I want to or not, but I also have a
16 contract provision which I'm exercising under 362(b)(17) that
17 says I don't have to perform if the debtor is not
18 performing." Judge Peck had little patience -- had little
19 patience with that provision and said, "You waived your right
20 to terminate on account of the bankruptcy. You haven't done
21 it, and you can't exercise other remedies." That's not the
22 scope of this exception known as 362(b)(17). It's far
23 narrower.

24 Another bank would come along shortly thereafter,
25 the Bank of New York. And your Honor may be familiar -- and

1 I know that it did come up, I think, in Collins & Aikman
2 where there are special provision entities where there are
3 management rights, and if one were to become bankrupt, the
4 management rights would flip to the nondebtor. Someone
5 sought to enforce such provision against Lehman. They had a
6 swap and a financial contract, and they also had this flip
7 right. And they literally read 362(b)(17), any contract
8 right. Judge Peck said absolutely not.

9 It's not confined to Wall Street cases, your Honor.
10 In Calpine there was a forward contract in the energy field
11 between Calpine and Reliant Energy, and Judge Lifland was
12 confronted with Reliant Energy as a nondebtor trying to
13 exercise a right, a remedy, under its contract under 362(b).
14 Judge said, "Wait a minute. You're not terminating this
15 forward. That's all that's protected in the safe harbor.
16 It's not a roving commission to do what you want to a debtor
17 and withhold."

18 Your Honor, Judge Gonzales had a similar experience
19 in Enron when someone commenced a DEC action in state court
20 in reliance on a remedy in their contract, and he found that
21 that, too, was a violation of the stay.

22 But what I'm kind of concerned about -- and I
23 certainly did not mean to concede -- we're not sure since
24 we've heard conflicting statements and we certainly are not
25 conceding that Syncora has any contract rights with respect

1 to the casino revenues and the collateral agreement. In
2 fact, we've heard them say they're not doing anything. To
3 your Honor's point earlier, they're passive. So, your Honor,
4 we think they can't be on all sides of this issue. We think
5 that the automatic stay of 362(a) has to rise to protect
6 property of the city of this magnitude. Your Honor, this
7 property has substantial value. It can support substantial
8 leverage to resolve this case. It should be protected by the
9 automatic stay as a critical resource of the city, but its
10 characteristic as a tax can't be ignored either, which would
11 bring in the separate protection of Section 922(a)(2). And,
12 your Honor, there's only one exception for that, and that's
13 in the safe harbors themselves, not the exceptions from the
14 stay, and I don't think that anyone, in light of the
15 forbearance agreement, certainly the swap counterparties, are
16 not terminating the swap.

17 Your Honor, I'd like to reserve the right to respond
18 as this was somewhat unscheduled, and we've tried to
19 anticipate the arguments that Syncora might raise.

20 THE COURT: Thank you.

21 MR. HACKNEY: Good afternoon, your Honor. Stephen
22 Hackney on behalf of Syncora. So there were a lot of cases
23 that were referenced there. I would propose to start with
24 each of the three arguments I think that were made as to why
25 the stay should not apply, and I'd propose to start with the

1 fact that we contend that the property of the casino revenues
2 is not property of the estate. And I thought it would be
3 helpful if I could walk the Court through where exactly this
4 property goes and how it gets to where it goes under the
5 collateral agreement, so there -- I don't think -- I heard
6 Ms. Ball say that I guess maybe they're reserving on the
7 question of whether it's a special revenue, but these are
8 excise taxes that we believe constitute special revenues that
9 are imposed on the activity of gaming and gaming related
10 activities. They come into the hands of the casino, and then
11 instead of being paid to the city, as they normally would be,
12 the city gave irrevocable instructions to the casinos
13 directing them to pay the money to U.S. Bank. And the
14 irrevocable instructions are interesting because they also
15 come with a release that says if you pay the money to U.S.
16 Bank, you have no further obligation. You are released.
17 U.S. Bank then under the collateral agreement sets up a
18 number of accounts. There's an account called the holdback
19 account, there's an account called the developer account, and
20 there's an account called the general receipt subaccount.
21 Put the holdback account over to this side for a moment
22 conceptually. The developer account and the general receipt
23 subaccount are accounts that U.S. Bank itself sets up under
24 the collateral agreement. They are housed at -- in New York
25 City, so the accounts themselves are physically outside the

1 State of Michigan. The funds then go into the developer
2 account, and U.S. Bank at certain times then itself transfers
3 the funds from the developer account to the general receipt
4 subaccount. They are only paid -- and the collateral account
5 uses the word "the custodian shall make payment of the funds
6 to the city upon the" -- either the city fulfilling certain
7 specific events or the nonoccurrence of other events as we
8 contend under Section 5.4, a termination event, an event of
9 default. If those things are happening, then the custodian
10 shall not pay to the city the funds in the general receipt
11 subaccount.

12 The reason I'm going through this in such detail is
13 because the question is whether or not the casino revenues
14 are property of the estate. I don't think it's a question as
15 to whether the debtor has an interest in them. It certainly
16 has an interest in them, but that is not tantamount to saying
17 that it is property of the estate. Here the --

18 THE COURT: What's the nature of that interest that
19 you concede?

20 MR. HACKNEY: I would -- what we have analogized it
21 to, your Honor, is a residual interest like one in an escrow
22 account. And, in fact, I think we have made an argument in
23 our papers that the collateral agreement does create an
24 escrow account under New York law. It has the hallmarks of
25 an escrow --

1 THE COURT: Would you agree it's a contingent
2 interest?

3 MR. HACKNEY: Yeah. I think -- I would think of it
4 as residual, but I think contingent maybe is also accurate in
5 the sense that it is contingent upon a number of things
6 either coming to pass or not coming to pass before the city
7 has a right to receive the property, but we have cited the
8 cases to you that we cited --

9 THE COURT: Well, let me ask you to pause one more
10 time --

11 MR. HACKNEY: Oh, you bet.

12 THE COURT: -- for what, you know, will seem like a
13 silly question, but I'm going to put it to you anyway. If
14 it's not the debtor's property, whose is it?

15 MR. HACKNEY: I think that the answer to that is
16 that it is property of the custodian. The custodian has
17 title to the property. It has control and possession over
18 the property. There are other people that have interests in
19 the property. The service corporations have an interest in
20 the property by operation of the city pledged to them.

21 THE COURT: The custodian has no beneficial interest
22 in the property.

23 MR. HACKNEY: I would have to think about that some
24 more. The custodian is entitled to --

25 THE COURT: There are no circumstances under which

1 the money would ever go to the custodian for the custodian's
2 own use and benefit; right?

3 MR. HACKNEY: I will have to duck that one, your
4 Honor, and say I'm not sure just because there are
5 circumstances where in its role as contract administrator the
6 contract administrator is allowed to pay itself some of its
7 fees. I don't know if the custodian has similar provisions
8 that say, "Oh, by the way, before I kick the money out, I get
9 to hold back the X, Y, and Z." I'm not saying it does. I'm
10 just saying I'm not certain. I can't concede it from the
11 podium, but -- so does the service corporation have an
12 interest in this property that is the property of the
13 custodian? Yes. Does the swap counterparty --

14 THE COURT: All right. Let's stop there.

15 MR. HACKNEY: Yeah.

16 THE COURT: Assuming for the moment that the city
17 has even a contingent interest in the money on deposit in
18 this account, isn't any attempt to exercise control over that
19 contingent interest stayed by Section 362(a)(3)?

20 MR. HACKNEY: Yeah. I guess I would say we don't
21 believe so, your Honor, because of the cases that we have
22 cited that say where in the context of an escrow all the
23 debtor has is a contingent interest that isn't sufficient to
24 establish that the property is property of the estate, and so
25 the stay does not apply in the first instance. And I would

1 note that we have also cited cases to this effect.

2 THE COURT: But what's the logic behind that? I ask
3 that because in every other circumstance I can think of where
4 a debtor has a contingent interest in property, that
5 contingent interest is considered to be property of the
6 estate protected by the automatic stay. Why would an escrow
7 agreement be any different?

8 MR. HACKNEY: Well, I can only say that I guess
9 reason number one would be certainly we've cited cases
10 suggesting that it is, but in terms of the policies behind
11 those cases --

12 THE COURT: Okay.

13 MR. HACKNEY: -- I think the policies are that there
14 is value to having certainty with respect to security that's
15 been granted by a debtor that is no longer under its
16 possession or control, and so you can see a situation where
17 if the debtor -- I can see where the debtor has -- is driving
18 its car around, but, yes, it's pledged the title to a bank
19 there. The debtor still retains the primary possession and
20 ownership of the property. The creditor there's interest is
21 a security interest that they're not allowed to foreclose
22 upon without violating the automatic stay. I understand that
23 as an example where there are contingencies to the debtor's
24 interest, but it's got the hallmarks of possession and
25 control, and it's actually using the car. Where I think

1 things change from the standpoint of the Bankruptcy Code,
2 they certainly change from the standpoint of the cases that
3 we've cited is where the debtor now gives the car as well to
4 the bank that's also holding the title and saying, "Now this
5 is property that can be held pursuant to this agreement. I
6 can only get it back in these certain circumstances."

7 THE COURT: So if under state law a creditor has a
8 possessory security interest in property, your position would
9 be that that creditor is not required to seek relief from the
10 stay because the stay doesn't apply? That's an extraordinary
11 position to take.

12 MR. HACKNEY: Where the creditor has a possessory
13 interest in --

14 THE COURT: Possessory, yeah. It holds possession
15 of the property as a secured creditor under state law like a
16 pawn shop or a bank that holds a CD, for example, as a
17 security interest.

18 MR. HACKNEY: What I would say is that the escrow
19 cases we have cited I think read onto that circumstance that
20 you've identified, which is that, yes, where the maintenance
21 of the escrow, the continued operation of the escrow
22 subsequent to the bankruptcy filing does not constitute a
23 violation of the automatic stay.

24 THE COURT: Well, but that would only be because the
25 stay doesn't apply; right?

1 MR. HACKNEY: That is correct. I mean I'm not
2 trying to assume the conclusion, but I'm saying the cases
3 that we have cited were considering the question of whether
4 or not the maintenance of the escrow violated the automatic
5 stay because of the fact that the debtor had -- did have
6 potentially a residual interest in the property that was in
7 the escrow account, and what those cases said is the debtor's
8 residual interest does not rise to the level of making the
9 property property of the estate. Part of the reason we're
10 analogizing to them is we do think at some point the rubber
11 has to meet the road in terms of looking at --

12 THE COURT: Well, but there are a gazillion cases
13 that say a secured creditor who's in possession of collateral
14 must turn that over to the debtor and -- to the debtor, and
15 the creditors' relief is to ask for adequate protection,
16 right --

17 MR. HACKNEY: Your Honor, I have to --

18 THE COURT: -- outside of Chapter 9?

19 MR. HACKNEY: I have to say I -- I will say, your
20 Honor, I'm not familiar with those cases as I stand here
21 today. I prepared on the cases that were cited in the city's
22 papers. It does seem to me, though, that to the extent those
23 cases hold that way, that the creditor has to pay the money
24 over to the debtor, they may be distinguishable from the
25 escrow context wherein the escrow is specifically designed to

1 capture the money while different parties' potential rights
2 are assessed, so I can only say that the cases we have cited
3 are ones in which there's -- it's agreed that the debtor has
4 a contingent and residual interest to the property
5 potentially someday, but it doesn't have either possession or
6 control of the property. We have cited cases saying that the
7 operation of the escrow is not outside the automatic stay.

8 Your Honor, I would like to speak briefly, if I
9 could, to the question of the pledged special revenues. So I
10 don't think that there's a real debate that -- as to whether
11 these are pledged special revenues. I understand counsel's,
12 I guess, reserved on that, but they are excise taxes.
13 There's an opinion from Orrick Herrington that was issued in
14 connection with the 2009 collateral agreements formation
15 identifying the wagering taxes as excise taxes, and Mr. Orr
16 himself in his proposal identified them as such, so I think
17 what I'd like to turn to, though, is the city's argument that
18 there's not going to be any application to indebtedness
19 because -- the fact that they're staying current on the swap.
20 And I want to address this because I think this misapprehends
21 the precise nature of the structure because the obligations
22 to make the periodic swap payments are the obligations of the
23 service corporation. The city's obligations that are secured
24 by the city's pledge of these revenues are obligations under
25 the service contracts. All of the city's obligations under

1 the service contracts have accelerated as a result of the
2 city's bankruptcy filing, so we disagree with the fact that
3 the city is current with respect to its obligations under the
4 service contract that the city pledged secures. So I think
5 that argument by the city misses the mark.

6 THE COURT: Is that acceleration legal?

7 MR. HACKNEY: To the best of my knowledge, it is,
8 your Honor. It's provided for in the service contracts that
9 the city signed that contain numerous opinions that were
10 rendered with them regarding the legality of those contracts.

11 THE COURT: Is there any other indebtedness you rely
12 on?

13 MR. HACKNEY: Well, I guess what I would say is that
14 the ultimate application of the wagering revenues to the
15 obligations of the service corporations under the swap in the
16 future would also be potential indebtedness that would
17 require the trapping now. For example, if Mr. Orr decides
18 I'm going to stop paying the swap in light of the fact that
19 the trap is valid, then the payments will be made out of the
20 trapped funds via the -- from the city -- from the custodian
21 to the --

22 THE COURT: Let's assume your argument is accurate
23 as far as it goes. That is to say, the party holding the
24 lien can proceed. How does that help you? Why does that
25 suggest that there's no stay against Syncora because Syncora

1 does not have a lien?

2 MR. HACKNEY: Well, first of all, the language of
3 Section 922(d) is not versed in the language of who possesses
4 the right in question, which distinguishes it from something
5 like 362(b)(17), which we'll get to in a moment, which talks
6 about swap participants, but let me answer your question
7 head-on, your Honor, and say that remember that this is an
8 integrated transaction, and so the collateral agreement not
9 only takes pains to integrate itself into the swaps
10 agreement, the services agreement, and the contract
11 administration agreement, the swaps agreement also makes
12 clear that the services contract, the collateral agreement,
13 and the contract administration agreement are all credit
14 support documents underneath the swap agreement.

15 Now, the significance of this, your Honor, is that
16 the way this structure works is that because Syncora
17 possesses the -- along with FGIC, but because the insurers
18 possess the ultimate economic exposure here to the structure,
19 the system -- the structure gives them the power to enforce
20 the various agreements and the right to direct the actions of
21 other people. So if you look at the swaps agreement, for
22 example, Syncora is an explicit third-party beneficiary with
23 the rights to enforce the obligations underneath the swap
24 agreement, which, as I've noted, is integrated with these
25 other agreements. Under the services contract, it's also an

1 explicit third-party beneficiary with the rights of
2 enforcement, and what is also unique is that under the
3 contract administration agreement, it has the rights to
4 direct the actions of the service corporation, the custodian,
5 and the swap counterparties. The reason for that, your
6 Honor, is in order to remain in control of a structure that
7 it's ultimately going to be paying people on, if you default
8 on your insurance, you lose these control and direction
9 rights, so you have to be staying current, which Syncora has
10 done, but the -- I'm trying to be responsive to your point,
11 which is to say they keep saying -- you know, it's like a
12 drum they're beating to say that -- what they're really
13 saying, your Honor, is Syncora is not a signatory to the
14 collateral agreement. And you know what? They're right.
15 Syncora is not a signatory to the collateral agreement, but
16 you should know that its consent was required to enter into
17 the collateral agreement. It is a noticed party under the
18 collateral agreement. There are provisions in the collateral
19 agreement that say that in order to exercise its rights under
20 the collateral agreement, it must not be in default of its
21 credit insurance that hearken back to the other provisions in
22 the services agreement and the swap and the contract
23 administration agreement that talk about not being in default
24 of your credit insurance, and so Syncora is absolutely a
25 party in interest and a third-party beneficiary with rights

1 of enforcement, and that would entail the right to direct the
2 conduct of the swap counterparties, so even if the Court
3 decided under 922(d) it is important to me, the Court, that
4 the party asserting 922(d)'s exemption of special revenues
5 being applied to indebtedness have some connection to that,
6 what I'm telling you, your Honor, is we absolutely do because
7 that's the way these agreements are designed to work in terms
8 of the control, the consent, and the direction rights.

9 Your Honor, I was going to speak briefly to the
10 question of Section 362(b)(17) of the Bankruptcy Code, if I
11 may.

12 THE COURT: Yes.

13 MR. HACKNEY: So the key argument here, there is not
14 a suggestion, I don't believe, that the swap is not a swap,
15 that the collateral agreement isn't a security agreement
16 within the meaning of a swap agreement, which, by the way,
17 extends to agreements beyond just the swap agreement. I
18 think the sole argument that the city is making here is that
19 Syncora is not a swap participant, and so I think I would not
20 belabor or repeat the arguments that I all just made about
21 the way Syncora is intimately connected to and has the powers
22 of different aspects of the agreements to both enforce them
23 directly and to direct other parties to do things including
24 the swap counterparties. So from my standpoint at a
25 functional level, if you look at the language as to whether

1 Syncora is a participant in the swap, it fits within the
2 plain language not only because it has potential economic
3 exposure to it, but also because it has rights of
4 enforcement, and it has rights to direct the swap
5 counterparties underneath the swap. To me that makes it a
6 swap participant under the plain language.

7 There is admittedly -- there is a dearth of
8 authority on this question. We've researched it to say can
9 we find a case one way or the other, and while I'll start as
10 an advocate by telling you that we found no case saying that
11 a swap insurer is not a swap participant, I'll also be candid
12 and tell you that we haven't found a case that says that a
13 swap insurer is a swap participant, so we're somewhat in a
14 case of first impression, but I wanted to offer you two
15 notes. The first is that that Lehman case that they did cite
16 in their briefs, which is a -- I would describe as a highly
17 distinguishable case -- there was a -- Lehman involved, I
18 believe, Bank of America as attempting to use its role as a
19 custodian in one context, to grab the money and use it to set
20 off against an unrelated agreement that it believed it had
21 with Lehman, and not only was it held not to have the setoff
22 rights, which were the premise for what it was doing, it was
23 also -- certainly shouldn't be using the amounts it was
24 holding as custodian in order to try and set off its other
25 obligations, so Lehman is inapposite. Obviously we take the

1 admonitions to be cautious with respect to the stay
2 seriously, and I'm not diminishing them, but here is what is
3 interesting about Lehman, I think, which is when Bank of
4 America invoked Section 362(b)(17) in Lehman, it was just a
5 custodian, you know. I mean, yeah, they're a signatory to a
6 swap, but are they really a participant in the swap? They're
7 not somebody that's going to benefit from the swap one way or
8 the other. And the Court in that case never said, "You're
9 not a swap participant." It said, "I will address your
10 argument on the merits as to whether Section 362(b)(17)
11 applies," and then concluded that it did not. And I think
12 that's significant because Syncora is absolutely a market
13 participant in connection with the swaps. Swap insurance is
14 a common aspect of the market, and so to ignore the practical
15 realities I think would ignore some of the purposes of the
16 safe harbor.

17 I would also note that we were able to find language
18 from Collier's, and this is 5 Collier on Bankruptcy 560.031,
19 and what it said was the special protections for swap
20 agreements provided by Section 560 and other provisions of
21 the Bankruptcy Code are available to all parties to swap
22 agreements with the debtor because the swap -- the term "swap
23 participant" is broadly defined in Section 101(53C) to mean a
24 entity that, at any time before the filing of the petition,
25 has an outstanding swap agreement with the debtor, thus the

1 swap protections are generally available to all parties who
2 could benefit therefrom. That's obviously --

3 THE COURT: Collier cite any cases in support of
4 that?

5 MR. HACKNEY: It does not in the provision I'm
6 reading, so take it for what it's worth, your Honor. I
7 understand it's not the same as a Supreme Court opinion, I
8 know, but in short I think that if you take a functional look
9 at the purposes of the Safe Harbor Act, it was designed to
10 provide certainty with respect to swap participants with
11 respect to things like collateral agreements.

12 THE COURT: How do you deal with Ms. Ball's argument
13 that under 922(b), Section 362(b) does not apply?

14 MR. HACKNEY: Yeah. So under 922 -- and I'm
15 sorry -- was that --

16 THE COURT: (B).

17 MR. HACKNEY: I want to make sure. There was an
18 argument made under 922(a)(2) that these are the collection
19 of taxes. Am I mis --

20 THE COURT: Well, 922(a)(2), yes.

21 MR. HACKNEY: And then --

22 THE COURT: It's a stay applicable to all entities
23 of the enforcement of a lien on or arising out of taxes or
24 assessments owed to the debtor. There's that stay.

25 MR. HACKNEY: Yeah.

1 THE COURT: But there's nothing that suggests that
2 (b) -- the exceptions in (b) -- 362(b) apply to that stay.

3 MR. HACKNEY: Okay. So at the first level, our
4 argument, your Honor, is that under Section 922(d) what
5 922(d) says, "Notwithstanding section 362 of this title and
6 subsection (a) of this section," so even if Ms. Ball were
7 correct -- and I will tell you why we don't concede that she
8 is -- they still have to run the rapids of 922(d) because it
9 specifically excepts 922(a).

10 The second thing I will tell you, your Honor, is
11 that I would say we have conducted research on this, and we
12 were, if I'm not mistaken, only able to find one case that
13 related to this provision, and it's in my iPhone, so I don't
14 have it for you because you have to turn your iPhone off in
15 the courtroom, so -- which is a good -- which is a good rule
16 because we're all too connected, but, anyway, I was reading
17 the case over lunchtime, and what my associate told me was he
18 was only able to find one case where this was invoked, and
19 the case there involved confusion or attempts to collect
20 taxes by an entity that was distinct from the debtor. I
21 don't believe that this is currently the enforcement of a
22 lien against -- arising out of the taxes or assessments owed
23 to the debtor. This is the natural operation of the
24 collateral agreement, the irrevocable instructions that were
25 entered into long ago, so there is no action that's being

1 taken by someone. That's what's frustrating to the city is
2 the inaction, the refusal to transmit the monies that the
3 city has set by this -- by the dead hand of the collateral
4 agreement and the irrevocable instructions to flow directly
5 to the custodian.

6 THE COURT: You keep tripping over that. There's
7 lots of case law that says that Section 362 doesn't
8 distinguish much between action and inaction, and I assume
9 that case law would apply to 922 because it's the same
10 language, if not the same policy. How do I deal with that
11 here?

12 MR. HACKNEY: Well, I guess the -- I think the --
13 you would deal with it first by saying that it only applies
14 to property of the debtor ab initio, so you do have to get to
15 that stage. And then second, even if the -- even if we are
16 on the subject of action versus inaction being irrelevant,
17 you also do have to find that 92 --

18 THE COURT: What the cases say is that there are
19 many circumstances in which the inaction of a creditor
20 constitutes the exercise of control over the debtor's
21 property.

22 MR. HACKNEY: But in those cases I'm going to
23 surmise there is a finding that it is property of the debtor,
24 and there's also --

25 THE COURT: Right.

1 MR. HACKNEY: So --

2 THE COURT: Right. It is.

3 MR. HACKNEY: I also don't want to assume the
4 conclusion the other way against me, which is we have a
5 threshold question that says it's not property of the debtor.

6 THE COURT: Okay. So there's two different issues.
7 The first is is what is at stake property of the debtor. The
8 second issue is is what the debtor is doing in relation to
9 that property an exercise of control over it.

10 MR. HACKNEY: That's right, and that the 9 --

11 THE COURT: What the cases say is that on the second
12 issue, the issue of exercise of control, inaction can be an
13 exercise of control.

14 MR. HACKNEY: And I think the -- so and not to
15 forget that 922(d) is also an exception to 922 --

16 THE COURT: Right.

17 MR. HACKNEY: -- (a)(2), but I think -- Mr. Bennett
18 has handed me a helpful note, and hopefully I'm doing him
19 justice, but what he points out is we are not seeking to
20 interfere with the contingent interest that the city does
21 have. It is merely that the property which is not the city's
22 property is the cash itself continue to be trapped, so that
23 is the distinction there which, again, folds back into our
24 argument that it's not property of the estate.

25 Your Honor, I have said my piece. I think we --

1 THE COURT: All right.

2 MR. HACKNEY: -- may have exhausted my knowledge
3 of --

4 THE COURT: Thank you.

5 MR. HACKNEY: -- bankruptcy law as well, so thank
6 you very much, your Honor.

7 THE COURT: Anyone else briefly without duplicating
8 what's already been said?

9 MR. NEAL: Yes, your Honor. Good afternoon again.
10 Guy Neal, Sidley Austin, counsel for National Public Finance
11 Guarantee Corp. I rise to echo or to -- to echo and to
12 underscore what Ms. Ball said about her reservations as it
13 relates to the special revenue determination, and without
14 treating this as a complete reservation of rights, which I
15 know is not something I need to do, I would encourage your
16 Honor to expressly reserve or avoid ruling on the issue of
17 whether or not these are special revenues such that they are
18 excepted from the automatic stay.

19 NPMF, among others -- I think about 12 or 13
20 others -- have filed an objection to the swap forbearance
21 motion, will be an active participant in discovery, will
22 litigate this issue on the 9th, and those threshold issues
23 that are raised -- and there are just three of them, so I
24 will be brief -- that were raised in NPMF's objection or
25 technically NPMF's joinder to Ambac's objection is that the

1 swap obligations are unauthorized under state law and,
2 therefore, void. State law does not authorize the city to
3 pledge casino revenue to secure swap obligations, and, third,
4 the casino revenue does not constitute special revenue, and,
5 accordingly, the swap counterparties do not have a lien on
6 post-petition casino revenue. I think these were the same
7 three issues that Ms. Ball appropriately reserved on. Those
8 are issues to be -- that have been extensively briefed and
9 will be extensively argued and litigated on the 9th, so I
10 would ask your Honor in your ruling today not to foreclose
11 any argument -- or foreclose us -- excuse me -- and others
12 who, frankly, are not here in the courtroom today, including
13 Assured and Ambac this afternoon, to make these arguments on
14 the 9th.

15 THE COURT: Thank you, sir.

16 MR. NEAL: Thank you very much.

17 THE COURT: Mr. Gordon, you rose.

18 MR. GORDON: I did, your Honor, and the vagaries of
19 going second -- Mr. Neal said everything I wanted to say.

20 THE COURT: Thank you.

21 MR. GORDON: But just for the record, we support the
22 same position. It was our understanding that the arguments
23 today were simply as to whether the stay had any effect on
24 Syncora as a third party not standing in the shoes of a swap
25 participant. Those issues are really to be dealt with on the

1 9th. Thank you, your Honor.

2 THE COURT: Anybody else before we get back to Ms.
3 Ball? One more, yes.

4 MS. FLUKER: Good afternoon, your Honor. May it
5 please the Court, Vanessa Fluker standing in for the attorney
6 of record, Jerome Goldberg, on behalf of interested party
7 David Sole. I do concur with Ms. Ball's arguments. I would
8 just like to highlight a couple points that I think add
9 something to that, and that is, number one, that the gravamen
10 of this whole issue is whether we have a special revenue
11 here, and I think that is significant. Counsel for Syncora
12 made an argument about the escrow and was very eloquent, but
13 the bottom line is the escrow was created based on the
14 alleged lien that was on the revenue that came into the city
15 via the wagering taxes. Therefore, it's incumbent to be able
16 to ascertain whether, in fact, this is a special revenue
17 which, pursuant to statute, it obviously is. If you look not
18 only at the definition under 902, but also if you look at the
19 Michigan statute that allocates the revenue, it specifically
20 articulates purposes that the revenue could be used for,
21 including hiring, training of street patrol officers,
22 neighborhood, downtown economic developments. It's just a
23 laundry list of things that it could be used for, so to say
24 that it was specifically earmarked for the payment of Syncora
25 as a custodian, I think that is a far stretch, particularly

1 when you have statutes incorporating this.

2 THE COURT: Not on the list?

3 MS. FLUKER: That is correct. They're not on the
4 list, exactly. Therefore, we believe that obviously the stay
5 is applicable and just based on pure statutory construction
6 in addition to the collateral agreement itself that does not
7 specifically isolate all of these funds that would make it
8 constitute a special revenue as defined by Section 902. I do
9 concur, as I indicated, with Attorney Ball.

10 THE COURT: Thank you very much, ma'am. Ms. Ball.

11 MS. BALL: Thank you, your Honor. If I may, I rise
12 for, I think, a very short list of points, but two of them
13 are critical. I have a picture which I think lays out what
14 Mr. Hackney tried to describe to you. I have one for Mr.
15 Hackney as well. May I approach, your Honor?

16 THE COURT: Yes.

17 MS. BALL: I think your Honor has appropriately
18 cautioned Syncora regarding the fact that secured creditors
19 remain subject to the automatic stay even if they're the IRS.
20 Your Honor may recall Whiting Pools where the IRS had seized
21 property and similarly claimed it's no longer property of the
22 debtor. The Supreme Court has told us that's clearly not
23 true, and, in fact, as I mentioned to you earlier, Judge
24 Bennett in his assessment in Jefferson County as to whether
25 or not possession by the receiver removed revenues from the

1 estate of Jefferson County similarly concluded no.

2 But I want to get back to three things that Mr.
3 Hackney said. On this -- this picture, your Honor, has
4 nothing to do with any agreement other than the collateral
5 agreement, and all the payments that are required to be made
6 are not made under the service contract as alleged by Mr.
7 Hackney. As a matter of fact, there are payments that
8 casinos every day are directed to pay revenues into that
9 general receipt subaccount. Monthly under the collateral
10 agreement the payments are made by the city under the
11 collateral agreement into the holdback account. Once there
12 is a -- once the city makes that payment into the holdback
13 account, every day, not remote in the future, not at the end
14 of the year, every day casino revenues are released in that
15 monthly cycle, so payments -- monthly payments are made by
16 the city under the collateral agreement, never goes near the
17 service corp., the service contract. It's a contractual
18 obligation under the collateral agreement. Similarly, under
19 the collateral agreement, the city has the right to obtain a
20 release of its funds from the holdback from the general
21 receipts account every day until the next monthly cycle
22 begins, so the city has a contract right under the collateral
23 agreement to have monies released to it from -- its monies
24 released to it from the general receipts subaccount on a
25 daily basis every day in the month after it has made the

1 payment.

2 THE COURT: What paragraph of the agreement are you
3 referring to?

4 MS. BALL: Pardon?

5 THE COURT: I'm sorry. What paragraph of the
6 agreement are you --

7 MS. BALL: Paragraph 5.2 of the collateral
8 agreement, your Honor. And then the payments to the city
9 from the holdback account are in Section 5.5, so everything
10 works here in a closed circle under this agreement that
11 Syncora is not a party to.

12 The other point which I think goes to the
13 application of special revenues to indebtedness, again,
14 assuming arguendo that the special -- that the casino
15 revenues are special revenues, the only obligation for which
16 the casino revenues stand as collateral is the hedge payable,
17 payments under the swap, very clear in the grant of the
18 security interest under the collateral agreement that that is
19 the scope of the city pledge, and that is in Section 4.1.
20 While I know it has been -- well, I don't know. It just
21 seems that it's been fundamental to the approach that my
22 colleagues representing Syncora have taken that this really
23 is a complex, interrelated, multiple, multi-party, everybody
24 is in the game situation, your Honor, that world changed, and
25 it changed radically in 2009. And what changed in 2009? And

1 I want to get to the Syncora consent.

2 What happened in 2009 was, your Honor may be aware
3 from all the papers, there was a downgrade of the city, but
4 the city wasn't the only one on its heels. The insurers had
5 been downgraded, and there had been an insurer event under
6 the swap as well, so here everyone was facing the prospect in
7 2009 of a massive default by the city and a massive amount of
8 money due. The city did the responsible thing. The banks
9 kind of had everybody. We were all on our heels, the city,
10 Syncora, FGIC. Nobody was in tremendous shape in 2009. I'm
11 sure it's a time that your Honor recalls well, particularly
12 in this part of the country.

13 So what happened in 2009? We've heard a lot about
14 the banks got collateral. Well, that's true, and I want to
15 come back to that. Two major things happened in 2009. We
16 focused on one. One was the city gave the swap
17 counterparties collateral in this closed circuit agreement
18 under a document which was not only -- the insurers weren't a
19 party to it, but, your Honor, also the city was very careful.
20 Kudos to them. In the section that my colleagues are so wont
21 to quote to your Honor, which the rest of us might refer to
22 as a merger clause, you know, Section 14, 14(a), that all
23 these other documents constitute the entire agreement of the
24 parties, it's very interesting because only three places --
25 and I would dare our colleagues to find more -- where the

1 word "insurer" is even mentioned in the collateral agreement,
2 and it's mentioned in the merger section. You know what it
3 says? This section does not apply to any rights and
4 obligations of the insurers. The insurers had nothing to do
5 with the collateral agreement. Why? Because a second change
6 happened in 2009. And, your Honor, it was very obvious
7 because the ordinance of the city in that summer of 2009 had
8 a term sheet, and the term sheet kind of highlighted it very
9 nicely. It laid out in gory detail the fact that the city
10 was now going to pay a higher rate of interest to the banks.
11 It was going to put up collateral. But it also provided for
12 the end of the hedge. It severed the tie between the COP's,
13 which are the certificates of participation, insure the other
14 insurance obligation by Syncora that has nothing to do with
15 the swaps, and Syncora disagrees with that construction, but
16 it, in essence, said to the banks you get a free -- get out
17 of jail free card. You can walk away from these swaps
18 anytime you want, and, you know, your Honor, when do you
19 think a rational financial player is going to walk away from
20 those swaps? When they're going to be out of the money for
21 the banks. So rather than ever have to pay a nickel, the
22 banks got the right to just wash their hands and say, "We
23 walk." Well, that's a radical change, your Honor. That
24 meant that the hedge could never really be a value to the
25 city. It was never going -- to the service corps. Excuse

1 me. It was never going to be in the money. That was kind of
2 a radical change, but it was consistent with the city's view
3 that we are pledging this incredible revenue stream, the last
4 big one we have, to the banks, and we want to be able to get
5 it back. So if those swaps are terminated, we only have to
6 deal with you, and we'll get our -- we'll get our revenue
7 stream back. But that is an immense change, your Honor, and
8 what's very interesting -- and I have copies with me should
9 your Honor want to walk through this with me. Mr. Hertzberg,
10 perhaps you can help me. Mr. Hackney is a hundred percent
11 correct that Syncora was asked to consent to everything that
12 happened in 2009, and I have with me, your Honor, a copy of
13 their waiver and consent. May I approach?

14 THE COURT: Yes.

15 MS. BALL: Your Honor, in the third paragraph on the
16 first page of that waiver and consent --

17 THE COURT: All right. I'll let you describe this
18 to me briefly, but I'm going to --

19 MS. BALL: Your Honor, suffice it to say all the
20 agreements that they consented to were appended to their
21 consent, and, in fact, Syncora did consent not once but four
22 different times because they had four different policies on
23 four different swaps to this amendment that broke the hedge,
24 that broke the --

25 THE COURT: Okay. So what does this have to do with

1 whether the stay is applicable --

2 MS. BALL: Your Honor, it goes to the --

3 THE COURT: -- in the circumstances that we're
4 talking about here?

5 MS. BALL: Sorry. It goes to any debt unpaid on the
6 COP's or the service are so far afield from this pledge and
7 should not be countenance in the context of suggesting that
8 922(d) is applicable here. It is only payments under the
9 swap, and they have all been timely made. And all the
10 payments in our contract rights to get the release of
11 revenues are under the collateral agreement, and that's a
12 right that we believe the automatic stay and the stay of
13 Chapter 9 protect. It is not a very complicated series of
14 many other things. The city pays every month. Thereafter
15 every day they get their revenues, their tax revenues. Your
16 Honor, I think there should be no doubt that it remains
17 property of the city throughout, and I think, as I said
18 earlier, the remedy section of the collateral agreement,
19 which is the only way to get remedies should they trap, also
20 provides that you have to go through all the hoops to get to
21 that property because it's city property, and you only get
22 there by appropriation. So to suggest that it ever ceases
23 being property of the city is totally contrary to this
24 agreement, which is the agreement by which these revenues are
25 delivered to the custodian. I can see I've worn out my

1 welcome. I'm sorry. Thank you.

2 THE COURT: Thank you.

3 MS. BALL: Do you have any questions?

4 MR. HACKNEY: Just a brief rebuttal.

5 THE COURT: Yes, sir.

6 MR. HACKNEY: I will resist the temptation. I'm not
7 always good at resisting temptations, but I'm not going to
8 argue the way the structure works and our interpretation
9 because it's super technical, and I don't believe it's
10 germane here, so I'm going to just respectfully disagree with
11 Ms. Ball.

12 But I want to address the diagram because you'll
13 remember that in my argument I said that the payments under
14 the service contract which the city pledged definitely
15 secures had all accelerated so that there is a disagreement
16 with us with their contention that the city is current.
17 They're holding this diagram up to say, no, look, the amounts
18 go directly to the counterparties from the holdback account.
19 I only want to tell you that this is a very technical point,
20 but under Section 5.7(a)(1) of the collateral agreement, it
21 says "payments to the counterparties and the custodian from
22 the holdback account," and it says, "The custodian shall pay
23 to the counterparties from the holdback account at the end of
24 each quarterly period" -- so these are the three months that
25 have now stacked up -- an amount equal to all hedge periodic

1 payables, capital HPP. Hedge periodic payables are defined
2 in the service contract as a periodic amount owing by the
3 corporation under a stated hedge, so the only reason I'm
4 making this hypertechnical point is to say that to the extent
5 these payments are made to the counterparties, they are made
6 for the ultimate benefit of the service corporation, which
7 is, of course, the party to the swap.

8 The only other limited point I wanted to make, your
9 Honor, is that in Section 14.14 where Ms. Ball said there's
10 this sort of curious reference to Syncora, it says words to
11 the effect of Syncora's rights and obligations shall be
12 unaffected by -- this section does not apply to any rights or
13 obligations of the capital line insurers. This is the
14 integration provision of the collateral agreement.
15 Obviously, a quick reminder that the swap itself references
16 the collateral agreement, the services contracts, and the
17 contract administration agreements as credit support
18 documents, so there's integration on that end as well, but
19 more importantly, I think all this is doing is noting that
20 Syncora's insurance obligation contracts are not referenced
21 in the various documents that are part of the integration,
22 and we are not claiming that we're coming through one of our
23 insurance documents and exercising direct rights. We are
24 claiming that we have enforcement and consent and direction
25 rights as third-party beneficiaries explicitly in the

1 agreements. That's all I think that provision is designed to
2 do. Thank you for your patience today, your Honor.

3 THE COURT: All right. The Court will take this
4 under advisement and either written -- either issue a written
5 opinion before next Wednesday or give it to you on the record
6 at that time when we reconvene on the discovery and
7 disclosure issue.

8 MR. HACKNEY: Your Honor, if I could say --

9 THE COURT: One thing -- sir.

10 MR. HACKNEY: I'm sorry. Just to the extent there
11 was any failing in my presentation today to respond to some
12 of your questions, I wanted you to know that we would be
13 happy to submit additional pleadings. I know that you get a
14 lot of pleadings every day, but --

15 THE COURT: Okay.

16 MR. HACKNEY: -- there were some questions you posed
17 that if you'd like more, we'd be happy to prepare --

18 THE COURT: In the meantime, the Court will maintain
19 the status quo, whatever that is. At some point, in light of
20 the city's agreement to dissolve the TRO perhaps after the
21 court rules on the stay motion, the two of you can prepare an
22 order and submit it to the Court that accomplishes that.

23 There is one more matter that I want to discuss with
24 certain parties, and I'm looking at the -- what?

25 MS. CALTON: I'm sorry. On the order dissolving the

1 injunction, could they circulate it to the casino so we can
2 make sure the language protects us for making payments in the
3 interim and not be at risk to have to pay them a second time?

4 THE COURT: Any objection to that?

5 MR. SHUMAKER: No, your Honor.

6 MR. HACKNEY: No.

7 MS. CALTON: Thank you.

8 THE COURT: You're welcome. Okay. So I want to
9 have a conversation with certain attorneys but not with
10 everyone, so I need a show of hands. Who here represents
11 parties who are signatories to any of the agreements that
12 have been discussed here today? Okay. If your hand is not
13 raised, I'm going to ask you to leave the courtroom at this
14 time. That includes members of the press and the public.
15 I'm going to ask you to leave the courtroom at this time if
16 you do not represent a party to one of these agreements.
17 Turn it off. Turn it off. We're going to turn off CourtCall
18 and the overflow courtroom communication as well.

19 (Proceedings concluded at 4:25 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

August 29, 2013

Lois Garrett